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No. 9019

United States

Circuit Court of Appeals

For the Ninth Circuit.

LYON COUNTY BANK MORTGAGE CORPORATION, a corporation,

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Nevada.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

GEORGE L. SANFORD, Esq.,
Carson City, Nevada, and

A. L. HAIGHT, Esq.,
Fallon, Nevada.
For the Appellant.

N. J. BARRY, Esq.,
Reno, Nevada,
For the Appellee. [1*]

In the District Court of the United States,
in and for the District of Nevada

No. 2721

LYON COUNTY BANK MORTGAGE CORPORATION, a corporation,
Complainant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association,
Defendant.

COMPLAINT

Complainant complains of defendant and alleges:

I.

That complainant is now, and at all times since the 1st day of November, 1933, has been, a corpora-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

tion formed for the sole and only purpose of liquidating the assets of the hereinafter-named Lyon County Bank and organized and existing under and by virtue of the laws of the State of Nevada; [2]

II.

That The Reno National Bank is, and at all times herein mentioned was, a national banking association organized and existing under and by virtue of the laws of the United States of America, and up to about the 1st day of November, 1932, was doing a general banking business in the city of Reno, state of Nevada;

III.

That Lyon County Bank is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and up to about the 16th day of February, 1932, was doing a general banking business in the City of Yerington, state of Nevada:

IV.

That on or about the 1st day of July, 1931, said Lyon County Bank, for a valuable consideration, executed and delivered to said The Reno National Bank its certain promissory note, in words and figures as follows, to wit:

$60,500.00 Reno, Nevada, July 1, 1931

On demand after date, without grace, for value received, Lyon County Bank a corporation, promises to pay to The Reno National Bank or order at

its Banking Office in Reno, Nevada, the sum of Sixty thousand five hundred 00/100ths Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureties, gurantors and assignors, severally waive [3] presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder.

In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

[Seal] LYON COUNTY BANK

By J. I. WILSON

President

By GEO. F. WILLIS

Secretary

No. 5166

V.

That said Lyon County Bank did, under date of July 22, 1931, execute and deliver three certain collateral security agreements to said The Reno National Bank, copies of which are attached hereto as a part of "Exhibit X" and by this reference are made a part of this complaint; and that simultaneously with the delivery thereof to said The Reno National Bank, and for the purposes set out in said agreements, the said Lyon County Bank assigned, delivered and deposited with the latter the following- [4] described property, to wit:

6/$1000.00 First Lien Coupon Certificates of the Mortgage Security Corporation of America, Series B-10, of January 1, 1941 maturity—Nos. 9505 to 9510 Inclusive.

22/$1000.00 Walker River Irrigation Dist., First Issue Series 1, 6% Bonds, of January 1st, 1940 maturity, Nos. 845 to 850 Inc., 894, 896, 898, 900, 902, 904, 906, 920, 922, 924, 926, 928, 930, 932, 934, and 936.

Note of Loraine L. & J. Wedertz for $5000.00 dated May 15, 1931.

Note of Elmer S. & Cora H. Wedertz for $7300.00 dated Feb. 27, 1931.

Note of H. E. & Roena W. Carter for $5500.00 dated May 1, 1931.

Note of Montelatici, et als for $8000.00 dated June 20, 1930.

Note of David Jones, et als for $16500.00 dated February 27, 1930.

Note of Yparraguirre, P. M. & Bertha for $24800.00 dated June 15, 1931.

together with certain mortgages given to secure the payment of the above-described promissory notes;

VI.

That on February 16, 1932, the actual value of the assets of said Lyon County Bank was insufficient to pay its liabilities and it was unable to meet the demands of its creditors in the usual and customary manner and was insolvent; that on [5] the last-mentioned date the state Bank examiner of the State of Nevada took possession of the property and business of such bank under and pursuant to the banking laws of the State of Nevada and retained such possession until the 29th day of March, 1934, when the same was delivered to the complainant as hereinafter stated; and that said The Reno National Bank knew of such taking possession by the state bank examiner at all times on and after February 16, 1932;

VII.

That, after taking possession of the property and business of said Lyon County Bank as aforesaid, the said state bank examiner gave notice in the manner and for the time required by law, calling on all persons having claims against said bank to present the same to the said state bank examiner

and make legal proof thereof, at the office of said Lyon County Bank, in Yerington, Nevada, on or before September 2, 1932; and that, pursuant to such notice, said The Reno National Bank filed with said state bank examiner its claim against the Lyon County Bank, a copy of which is attached hereto marked "Exhibit X" and by this reference made a part hereof;

VIII.

That complainant is informed and believes, and upon such information and belief alleges, that on or about the 9th day of December, 1932, the Comptroller of the Currency of the United States, acting under and pursuant to the laws of the United States, investigated and examined the condition of said The Reno National Bank and after such investigation and examination said Comptroller of the Currency became satisfied and found that said [6] The Reno National Bank was insolvent, and thereupon duly appointed W. J. Tobin receiver of said The Reno National Bank and its property; and that on or about the 9th day of December, 1932, said W. J. Tobin duly qualified as such receiver and ever since has been, and now is, the duly appointed, qualified and acting receiver of said The Reno National Bank and as such has possession of all the property, business and assets of said The Reno National Bank;

IX.

That, pursuant to a judgment made and entered on the 26th day of October, 1933, in the First Judi-

cial District Court of the State of Nevada, in and for Lyon County, in an action pending therein designated as No. 2727, in conformity with the statutes of the State of Nevada in such case made and provided, the state bank examiner (then superintendent of banks) of the State of Nevada and the said Lyon County Bank conveyed, assigned and set over to the complainant corporation all of the property, real and personal, all stocks, bonds and notes, actions and causes of actions, books and records, and all assets of every kind and character of said Lyon County Bank, on the 29th day of March, 1934; and that at all times since said last-named date the complainant corporation has been, and still is, the owner and entitled to the possession thereof;

X.

That complainant is informed and believes, and upon such information and belief alleges, that on February 16, 1932, the amount owing upon the said promissory note of July 1, 1931, by said Lyon County Bank to said The Reno National Bank, including interest to that date, was the sum of Sixty-one Thousand One [7] Hundred Five Dollars ($61,-105.); and that the said Lyon County Bank was not otherwise indebted to said The Reno National Bank;

XI.

That payments aggregating Sixty-five Thousand Eight Hundred Forty-one and 90/100 Dollars ($65,-841.90) have been received by the defendant and

said The Reno National Bank since February 16, 1932, on account of the indebtedness upon which the claim filed as aforesaid was founded; that said claim and indebtedness has been fully paid; that said defendant and said The Reno National Bank have received payment of the sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90) in excess of the amount to which they were entitled, to wit, the sum of Sixty-one Thousand One Hundred Five Dollars ($61,105.), being the amount owing on February 16, 1932, when the state bank examiner took possession of the property and business of the Lyon County Bank as aforesaid; and that said sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90) is in the possession of the defendant;

XII.

That the defendant still has in his possession, of the assets of the Lyon County Bank pledged to said The Reno National Bank on July 22, 1931, as hereinabove stated, the following to wit:

Promissory notes of H. E. and Roena W. Carter, upon which there remains an unpaid balance of Eight Hundred Seventy-three and 05/100 Dollars ($873.05), together with interest since October 21, 1936;

Promissory notes of Elmer S. and Cora H. Wedertz, upon which [8] there remains an unpaid balance of Thirty-four Hundred Seventy-one and

05/100 Dollars ($3,471.05), together with interest since October 21, 1936;

Together with certain mortgages given to secure the payment of the above-described promissory notes;

XIII.

That the complainant has, prior to the institution of this action, demanded of the defendant that he re-assign and return to the complainant the promissory notes and mortgages mentioned in paragraph XII hereof, and that he refund and pay over to the complainant the said sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90); but that the defendant has at all times wholly failed and refused so to do;

XIV.

That the assets of the said Lyon County Bank are wholly insufficient to make payment in full of the claims of depositors and creditors of said bank; that to this date but one dividend, amounting to approximately 22.5%, has been paid on account of the claims of creditors and depositors, and the remaining assets are not sufficient in value to pay more than 22.5% additional, or 45% in all, to the said claimants.

Wherefore, complainant prays judgment against the defendant:

(1) For the sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90) and for the re-assignment and return to the complainant of

the promissory notes and mortgages mentioned and referred to in paragraph XII of this complaint; [9]

(2) For its costs herein incurred; and

(3) For such other and further relief as to the court may seem meet in the premises.

GEORGE L. SANFORD
A. L. HAIGHT
Attorneys for Complainant

State of Nevada,
County of Lyon—ss.

H. C. Guild, being first duly sworn, deposes and says that he is the president of the corporation complainant named in the foregoing complaint; that he has read the said complaint and knows the contents thereof; and that the same is true of his own knowledge except as to those matters therein alleged on information and belief and, as to those, that he believes it to be true.

H. C. GUILD

Subscribed and sworn to before me this 30 day of March, A. D., 1937.

[Seal] LOUIS W. FRANKLE
Notary Public [10]

EXHIBIT X

In the Matter of the
LYON COUNTY BANK

CLAIM OF THE RENO NATIONAL BANK

The undersigned, The Reno National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, and doing a general banking business at its principal place of business at Reno, Washoe County, Nevada, presents this its claim against the Lyon County Bank to E. J. Seaborn, Bank Examiner of the State of Nevada, together with the necessary vouchers for approval.

That the Lyon County Bank is now indebted to The Reno National Bank in the sum of Fifty-eight Thousand, One Hundred Fifty and 34/100 Dollars ($58,150.34), being the balance on a certain promissory note hereinafter described, together with interest thereon at the rate of eight percent (8%) per annum, for money loaned and advanced by the said The Reno National Bank, which said indebtedness is evidenced by a certain promissory note dated July 1, 1931, payable on demand, a full, true and correct copy of which note, together with all the endorsements thereon, is attached hereto, marked Exhibit "A", and expressly made a part hereof.

That the aforesaid claim is secured by three collateral agreements executed by and between The Reno National Bank and the Lyon County Bank

on July 1, 1931, full, true and correct copies of which are attached hereto, expressly made a part hereof, and marked Exhibits "B", "C" and "D", respectively; [11] that on the 1st day of October, 1931, The Reno National Bank discounted a certain promissory note hereinafter described, paying full value therefor to the Lyon County Bank; that the Lyon County Bank endorsed and guaranteed the payment of said note, that there is now due on said note to The Reno National Bank the principal sum of Five Thousand Dollars ($5,000.00), with interest thereon from June 30, 1932, until paid, at the rate of eight percent (8%) per annum, payable semi-annually, a full, true and correct copy of said promissory note being attached hereto, marked Exhibit "E" and expressly made a part hereof.

That this claim is presented for the aggregate sum of Sixty-three Thousand, One Hundred Fifty and 34/100 Dollars ($63,150.34), Fifty-eight Thousand, One Hundred Fifty and 34/100 Dollars ($58,150.34) thereof representing the balance due on the principal sum of the promissory note in favor of The Reno National Bank hereinbefore mentioned, together with interest on the principal sum of said promissory note, to-wit: Sixty Thousand, Five Hundred Dollars ($60,500.00) at the rate of eight percent (8%) per annum from the 1st day of July, 1931, to the date hereof, and interest hereafter to accrue on said promissory note in accordance with the terms thereof, less the credit to interest heretofore paid as set forth and endorsed on said prom-

issory note, a full, true and correct copy of which is attached hereto, marked Exhibit "A", as aforesaid; and interest on Five Thousand Dollars ($5,000.00) thereof from the 30th day of June, 1932, to the date hereof, and interest hereafter to accrue in accordance with the terms of said promissory note, a full, true and correct copy of which is attached hereto, marked Exhibit "E" and expressly made a part hereof.

[Seal] THE RENO NATIONAL BANK
By P. L. NELSON
Its Cashier

THATCHER & WOODBURN
Attorneys for Claimant [12]

State of Nevada,
County of Washoe—ss.

P. L. Nelson, being first duly sworn, according to law, upon oath deposes and says: That he is the cashier of The Reno National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, and makes this affidavit on its behalf; that this affidavit is made by affiant on behalf of said claimant because claimant itself cannot take an oath; that affiant is an officer of said claimant corporation and is authorized to make this proof on its behalf, and it is necessary that this claim thus presented be verified by someone on behalf of The Reno National Bank.

That the amount of the claim of The Reno National Bank in the sum of Sixty-Three Thousand,

One Hundred Fifty and 34/100 Dollars ($63,150.34), together with interest on the principal sum of Sixty Thousand, Five Hundred Dollars ($60,500.) at the rate of eight per cent (8%) per annum from the 1st day of July, 1931, to the date hereof, less the credit to interest heretofore paid as set forth and endorsed on said promissory note, a full, true and correct copy of which is attached to this claim, marked Exhibit "A", as hereinbefore stated, is justly due, and that the interest which will hereafter accrue in accordance with the terms of said promissory note is justly made and will be due on demand; that interest on the principal sum of Five Thousand Dollars ($5,000.00) on the note signed by F. W. Simpson and endorsed by the Lyon County Bank is due from the 30th day of June, 1932, and that the interest which will hereafter accrue in accordance with the terms of said note will be due on demand, that no payments have been made thereon which [13] are not credited, and that there are no offsets to same to the knowledge of the affiant.

P. L. NELSON

Subscribed and sworn to before me this 1st day of September, 1932.

[Seal] JOHN DONOVAN

Notary Public in and for the County of Washoe, State of Nevada. [14]

EXHIBIT "A"

$60,500.00 Reno, Nevada, July 1, 1931

On Demand after date, without grace, for value received, Lyon County Bank a corporation, promises to pay to The Reno National Bank or order at its Banking Office in Reno, Navada, the sum of Sixty thousand five hundred 00/100ths Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder.

In Witness Whereof, the said Corporation has caused this *intrument* to be executed and its cor-

porate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

[Seal] LYON COUNTY BANK
By J. I. WILSON
President.

By GEO. F. WILLIS
Secretary.

No. 5166 [15]

That the following endorsements appear upon the back of the said note:

			Endorsement on Principal	Balance due on Principal
Feb	23	1932	$1000.00	$59,500.
Mar	3	1932	$ 956.36	$58,543.64
Mar	8	1932	$ 180.00	$58,363.64
May	3	1932	$ 106.65	$58,256.99
Jun	1	1932	$ 106.65	$58,150.34
			Endorsement on Interest	
Dec	16	1931	$2420.	to Dec 31 1931
Jun	30	1932	$ 180.	on acct
Jun	30	1932	$ 660.	" "
Jul	2	1932	$ 660.	" "
Jul	8	1932	$ 106.65	" "
Aug	8	1932	$ 106.65	" "
Aug	13	1932	$ 110.00	" "

[16]

EXHIBIT "B"

The Reno National Bank

Reno, Nevada, July 22, 1931.

As collateral security for the payment of all of Our present indebtedness to The Reno National Bank, of Reno, and all of the future indebtedness

to said Bank, which we may incur hereafter from any cause or upon any consideration we have assigned, and do hereby assign, deliver and deposit with said Bank the following described property, to-wit:

> 6/$1000.00 First Lien Coupon Certificates of the Mortgage Security Corporation of America, Series B-10, of January 1, 1941 maturity—Nos. 9505 to 9510 Inclusive.

of the value of ..... Dollars. and hereby give authority to said Bank, or its assigns to call for such additional security as it, or its assigns, may deem proper, which security we agree to give on demand, and on default being made in giving such security or in paying said indebtedness, then all of our indebtedness to said Bank shall be considered due and immediately payable, whether otherwise due or payable or not, at the option of said Bank, or its assigns, and the said Bank is hereby given authority to sell and deliver the whole or any part of said property, at either public or private sale, at any time or place, either with or without demand for payment, either with or without notice of such sale, and either with or without advertisement of such sale, as said Bank, its officers or agents may elect; such demand, notice and advertisement are hereby waived. At such sale said Bank or any other person or persons may become the purchaser of the whole or any part of said property. After deducting all costs and [17] expenses incurred in connection with such sale, including

reasonable attorney's fee, and the amount of said indebtedness, out of the proceeds of such sale, the surplus, if any, shall be paid to us or our heirs, or assigns, and we agree to pay any deficiency there may be, if any, in the payment of said indebtedness and costs and expenses of such sale, after the proceeds of sale have been applied as aforesaid.

LYON COUNTY BANK

[Seal] By J. I. WILSON,

Pres.

By GEO. F. WILLIS

Cashier. [18]

EXHIBIT "C"

The Reno National Bank

Reno, Navada, July 22, 1931.

As collateral security for the payment of all of our present indebtedness to The Reno National Bank, of Reno, and all of the future indebtedness to said Bank, which we may incur hereafter from any cause or upon any consideration we have assigned, and do hereby assign, deliver and deposit with said Bank the following described property, to-wit:

22/$1000.00 Walker River Irrigation Distr., First Issue Series 1, 6% Bonds, of January 1st, 1940 maturity, Nos. 845 to 850 Incl., 894, 896, 898, 900, 902, 904, 906, 920, 922, 924, 926, 928, 930, 932, 934, and 936

of the value of ..... Dollars. and hereby give authority to said Bank, or its assigns, to call for

such additional security as it, or its assigns, may deem proper, which security we agree to give on demand, and on default being made in giving such security or in paying said indebtedness, then all of our indebtedness to said Bank shall be considered due and immediately payable, whether otherwise due or payable or not, at the option of said Bank, or its assigns, and the said Bank is hereby given authority to sell and deliver the whole or any part of said property, at either public or private sale, at any time or place, either with or without demand for payment, either with or without notice of such sale, and either with or without advertisement of such sale, as said Bank, its officers or agents may elect; such demand, notice and advertisement are hereby waived. At such sale said Bank or any other person or persons may become the purchaser [19] of the whole or any part of said property. After deducting all costs and expenses incurred in connection with such sale, including reasonable attorney's fee, and the amount of said indebtedness, out of the proceeds of such sale, the surplus, if any, shall be paid to us or our heirs, or assigns, and we agree to pay any deficiency there may be, if any, in the payment of said indebtedness and costs and expenses of such sale, after the proceeds of sale have been applied as aforesaid.

LYON COUNTY BANK

[Seal] By: J. I. WILSON,

Pres.

By: GEO. F. WILLIS,

Cashier. [20]

EXHIBIT "D"

The Reno National Bank

Yerington, Nevada, July 22, 1931.

As collateral security for the payment of all of our present indebtedness to The Reno National Bank, of Reno, and all of the future indebtedness to said Bank, which we may incur hereafter from any cause or upon any consideration we have assigned, and do hereby assign, deliver and deposit with said Bank the following described property, to-wit:

Note of Loraine L. & J. Wedertz for $5000.00 dated May 15, 1931

" Elmer S. & Cora H. Wedertz for $7300.00 dated Feb. 27, 1931

" H. E. & Roena W. Carter for $5500.00 dated May 1, 1931

" Montelatici, et als for $8000.00 dated June 20, 1930

" David Jones, et als for $16500.00 dated February 27, 1930

" Yparraguirre, P. M. & Bertha for $24800.00 dated June 15, 1931

of the value of ..... Dollars. and hereby give authority to said Bank, or its assigns, to call for such additional security as it, or its assigns, may deem proper, which security we agree to give on demand, and on default being made in giving such security or in paying said indebtedness, then all

of our indebtedness to said Bank shall be considered due and immediately payable, whether otherwise due or payable or not, at the option of said Bank, or its assigns, and the said Bank is hereby given authority to sell and deliver the whole or any part of said property, at either public or private sale, at any time or place, either with or without demand for payment, either with or without notice of such sale, and either with or without advertisement of such sale, as [21] said Bank, its officers or agents may elect; such demand, notice and advertisement are hereby waived. At such sale said Bank or any other person or persons may become the purchaser of the whole or any part of said property. After deducting all costs and expenses incurred in connection with such sale, including reasonable attorney's fee, and the amount of said indebtedness, out of the proceeds of such sale, the surplus, if any, shall be paid to us or our heirs, or assigns, and we agree to pay any deficiency there may be, if any, in the payment of said indebtedness and costs and expenses of such sale, after the proceeds of sale have been applied as aforesaid.

LYON COUNTY BANK

[Seal] By: J. I. WILSON,
Pres.

By: GEO. F. WILLIS,
Cashier. [22]

EXHIBIT "E"

$5000.00 Yerington, Nevada, September 22, 1931.

On demand after date without grace, for value received I promise to pay to Lyon County Bank or order in Yerington Nevada, the sum of Five Thousand Dollars in U. S. gold coin with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable semi-annually also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest, for non payment of this note and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof. In the event of the non payment of this said note at maturity, or its collection by litigation, we jointly and severally agree to pay all expenses that may be incurred thereby including attorney's fee, and to that end bind ourselves, heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever we may be situated at the option of the holder.

F. W. SIMPSON

No. 6875
5370

Name—F. W. Simpson.

Payments:

Date—June 30, '32.

Interest—$308.88 to June 30, '32.

Principal—
Balance—
No. 6875—Date 9/22/31
Amount $5000.00
When due Interest 8%
Endorsers or collateral

Bond, $8000.00 and Mortgage on Smith Valley Improvement Club Hall for $2000.00.

Endorsed: Pay Reno National Bank or order for Re-Discount and Credit of Lyon County Bank Geo. F Willis Cashier.

[Endorsed]: Filed April 2, 1937. [23]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answering plaintiff's complaint on file herein, admits, alleges and denies as follows:

I.

Answering Paragraph XI of said complaint, defendant admits that payments aggregating the sum of $65,841.90 have been received on account of the indebtedness upon which the claim heretofore filed with the plaintiff was founded, but denies that said claim and indebtedness has been fully paid, and denies that defendant has received the sum of $4,736.90, or any sum, in excess of the amount to which he was entitled.

As a further defense to plaintiff's cause of action and by [24] way of counterclaim, defendant alleges:

I.

That among the assets of The Reno National Bank when defendant took possession thereof as Receiver, there was a note of the Lyon County Bank upon which there was then due as principal the sum of $59,543.64.

II.

That to secure the payment of said note, said Lyon County Bank had hypothecated to The Reno National Bank certain securities consisting of bonds, and notes secured by mortgage, as security for the payment of said principal obligation.

III.

That defendant, on the 21st day of October, 1936, had collected as interest on said collateral securities accruing after his appointment as Receiver of The Reno National Bank on or about the 12th day of December, 1932, the sum of $14,658.84.

IV.

That after applying said sum of $14,658.84 to the payment of the interest due on said primary obligation of the Lyon County Bank up to said 21st day of October, 1936 and the balance remaining after the application of the interest on said primary obligation, as aforesaid, said balance, together with the payments made on the principal of

said primary obligation and the sum of $956.36, which consisted of a deposit balance to the credit of Lyon County Bank in The Reno National Bank, reduced said indebtedness on said 21st day of October, 1936 to the sum of $9,316.94.

V.

That no part of said sum of $9,316.94 has ever been paid by the plaintiff to defendant, and the whole amount thereof, together with interest thereon from the 21st day of October, 1936 at the [25] rate of 8% per annum is now due, owing, unpaid and payable from the said plaintiff to the defendant.

Wherefore, defendant prays that plaintiff take nothing by its action and that he have his costs herein expended.

N. J. BARRY
Attorney for Defendant. [26]

State of Nevada,
County of Washoe.—ss.

W. J. Tobin, being first duly sworn, deposes and says:

That he, as Receiver of The Reno National Bank, is the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to those matters which

are therein stated on information and belief, and as to those matters, he believes it to be true.

W. J. TOBIN

Subscribed and sworn to before me this 9th day of September, 1937.

[Notarial Seal] MARY THOMPSON

Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Sept. 10, 1937. [27]

[Title of District Court and Cause.]

REPLY

Comes now the complainant and for reply to the answer of defendant and respecting the further defense and purported counterclaim and new matter in the same, denies, admits and alleges as follows, to-wit:

I.

Denies the allegation and matters in paragraph I, to-wit:

> "That among the assets of The Reno National Bank [28] when defendant took possession thereof as Receiver, there was a note of the Lyon County Bank upon which there was then due as principal the sum of $59,543.64."

Makes the same denial if the said sum be intended to be stated as Fifty-Eight Thousand Five Hundred Forty-Three and 64/100 Dollars ($58,543.64).

In this connection and in furtherance of its denials complainant alleges that on February 16, 1932, the total amount due and owing on the said note, including both principal and interest, was Sixty-One Thousand One Hundred Five Dollars ($61,-105.), of which Sixty Thousand Five Hundred Dollars ($60,500) was principal and Six Hundred Five Dollars ($605.) was interest. That on the said day by operation of law a credit entry on the part of Reno National Bank in the sum of Nine Hundred Fifty-Six and 36/100 Dollars ($956.36) was offset against said total amount of Sixty-One Thousand One Hundred Five Dollars ($61,105.) so that the total balance at the close of said day was not more than Sixty Thousand One Hundred Forty-Eight and 64/100 Dollars ($60,148.64) and was for principal only. That at the close of said day by operation of law the claim of Reno National Bank against Lyon County Bank was converted into a claim by Reno National Bank against the insolvent estate of Lyon County Bank in the sum of Sixty Thousand One Hundred Forty-Eight and 64/100 Dollars ($60,148.64). That the said insolvent estate was in such situation and its assets actual and potential were such that no general claim of or debt to any creditor could be paid in full in the principal sum owing at the date of insolvency and that after making payment out of all assets and funds pro rata on account of the claims of creditors there was and would be no funds or assets out of which to pay any interest accruing or promised on any such

claim and no such interest could be [29] paid from such insolvent estate, without making a preference forbidden by law; and no general claim could or can be paid except in equal proportion with other claims.

That on and after February 16, 1932, the Reno National Bank had a general claim against the said insolvent estate in the sum of Sixty Thousand One Hundred Forty-Eight and 64/100 Dollars ($60,-148.64) and no more. That on December 12, 1932, the time referred to in said paragraph I, the amount of the claim of Reno National Bank against said insolvent estate, for any reason, by reason of principal and accrued interest to February 16, 1932, or at all, was not in excess of Sixty Thousand One Hundred Forty-Eight and 64/100 Dollars ($60,-148.64), less the amount of the avails of the said collateral originally deposited by the debtor bank with the creditor bank credited or properly to be credited against said claim. That the said amounts so credited or to be credited properly in the period between February 16, 1932, and December 12, 1932 were not and could not be allocated to any interest on the said note and obligation or claim which accrued or is claimed to have accrued after February 16, 1932.

Notwithstanding the premises complainant alleges that Reno National Bank collected to October 21, 1936, as Reno National Bank admits, in paragraph I of the main answer, the total sum of Sixty-Five Thousand Eight Hundred Forty-One and 90/100 Dollars ($65,841.90), including the said off-

set of Nine Hundred Fifty-Six and 36/100 Dollars ($956.36), and continues to retain the said Carter notes and Wedertz notes described and as alleged in paragraph XII of the complaint (which matter defendant does not deny).

In this connection complainant alleges that the claim referred to in paragraph VII of the complaint (and to which reference is made in the main answer paragraph I, viz.: "the claim [30] heretofore filed with plaintiff," and the following words in said paragraph I: "Defendant admits that payments aggregating the sum of $65,841.90 have been received on account of the indebtedness upon which the claim heretofore filed with the plaintiff was founded, * * * ") was not a true, correct or just claim and that the alleged indebtedness is not and was not the "foundation" of such claim and said claim was not founded on the indebtedness alleged by defendant.

II.

Complainant denies the matters in paragraph II.

III.

Complainant denies the allegations and matters in paragraph III, to-wit:

> "That defendant, on the 21st day of October, 1936, had collected as interest on said collateral securities accruing after his appointment as Receiver of The Reno National Bank on or about the 12th day of December, 1932, the sum of $14,658.84."

And in this connection and in furtherance of its denials complainant alleges that the defendant was appointed receiver on December 12, 1932; that after the date of the said note, July 1, 1931, the Reno National Bank collected various sums as avails from the collaterals deposited with it and continued to collect the same up to and through the period of insolvency of Lyon County Bank and up to December 12, 1932, when the defendant receiver was appointed, and that from December 12, 1932, the defendant receiver collected various sums as avails from said collaterals up to the 21st day of October, 1936. Complainant is without information as [31] to how much of said collections were made as of interest on collaterals by the receiver in the period between the date of his appointment, to-wit, December 12, 1932, and the said 21st day of October, 1936, and makes denial accordingly.

In this connection complainant alleges that before the commencement of this suit, defendant stated the account herein, in writing, to complainant in the words and figures set out in "Exhibit A" annexed hereto.

In this connection complainant is informed and believes and alleges as follows:

1. That in the period from February 16, 1932, to October 21, 1936, there was collected from Collaterals and including the deposit of Nine Hundred Fifty-Six and 36/100 Dollars ($956.36) the total sum of Sixty-Five Thousand Eight Hudred Forty-One and 90/100 Dollars ($65,841.90), and of this

the sum stated to be collected as interest was Fifty-One Hundred Eighty-Two and 92/100 Dollars ($5,182.92) in its source as shown by "Exhibit A" in original sub-collateral endorsement.

In this connection complainant alleges the sub-collateral endorsement "8-13-32 Simpson Interest $110.00" carried and extended out to a primary endorsement of interest on the primary obligation, was not applicable for such endorsement or credit and should have been returned to the payer or applied as a credit against the principal of said primary obligation. Complainant alleges further in this connection that the interest avails that accrued after the date of said insolvency and actually collected by The Reno National Bank and W. J. Tobin, Receiver, did not exceed Twenty-Nine Hundred Thirty and 75/100 Dollars ($2,930.75).

2. That the said defendant later revised the endorsement of and account of collections so as to show totals collected [32] of Sixty-Five Thousand Six Hundred Sixty-One and 90/100 Dollars ($65,-661.90) and of this sum collected as interest was stated to be Twenty-Three Thousand One Hundred Eighteen and 97/100 Dollars ($23,118.97).

3. That the said defendant endorsed on the primary obligation account credits as follows: On principal (including $956.36) the sum of Sixty Thousand Four Hundred Ninety-Nine Dollars ($60,499.); on interest the sum of Fifty-Three Hundred Forty-Two and 90/100 Dollars ($5,342.90), leaving a balance on principal of One Dollar ($1.), and account-

ing for a total of Sixty-Five Thousand Eight Hundred Forty-Two and 90/100 Dollars ($65,842.90) as the claimed primary obligation.

4. That thereafter the said defendant made a revised primary endorsement after the 21st day of October, 1936, and purported to endorse credits on the primary obligation as follows: On principal, Fifty-One Thousand One Hundred Eighty-Three and 06/100 Dollars ($51,183.06); on interest Fourteen Thousand Six Hundred Fifty-Eight and 84/100 Dollars ($14,658.84); stated balance on principal Ninety-One Hundred Thirty-Six and 94/100 Dollars ($9,136.94) and accounting for a total of Seventy-Five Thousand One Hundred Fifty-Eight and 84/100 Dollars ($75,158.84) as the claimed primary obligation. None of said revisions or re-applications were or are consented to by this complainant.

Complainant alleges that the account of collections amounting to Sixty-Five Thousand Eight Hundred Forty-One and 90/100 Dollars ($65,841.90) is correct and admitted. That by reason of the stoppage of interest by insolvency the primary obligation and valid claim never exceeded Sixty-One Thousand One Hundred Five Dollars ($61,105.). That defendant is indebted to complainant in the sum or difference of Forty-Seven Hundred Thirty-Six and 90/100 Dollars ($4,736.90). Complainant alleges that the said receiver, [33] W. J. Tobin, without right, retained interest on collaterals accrued after insolvency of Lyon County Bank, amounting to Twenty-Nine Hundred Thirty and

75/100 Dollars ($2,930.75), but even in such case he should have applied only Sixty-One Thousand One Hundred Five Dollars ($61,105.) to the claim against the insolvent bank estate and should have refunded Eighteen Hundred Six and 15/100 Dollars ($1,806.15) to the debtor, besides surrendering the remaining collaterals. That there is no balance due on the primary obligation, or by reason of any valid claim either in the sum of Ninety-One Hundred Thirty-Six and 94/100 Dollars ($9,136.94) or in any other sum.

IV.

Complainant denies all the allegations and all the matters in paragraph IV.

In this connection complainant denies that the sum of Fourteen Thousand Six Hundred Fifty-Eight and 84/100 Dollars ($14,658.84) or any other sum other or more than the sum of Fifty-Three Hundred Forty-Two and 90/100 Dollars ($5,342.90) was ever applied by defendant to the payment of interest on said primary obligation. Denies that the sum of Fourteen Thousand Six Hundred Fifty-Eight and 84/100 Dollars ($14,658.84) was applied to the payment of interest due on said primary obligation. Denies that any such application coupled with the credit on principal of Nine Hundred Fifty-Six and 36/100 Dollars ($956.36) or any other actual applications on account of principal reduced the indebtedness on said primary obligation on the 21st day of October, 1936, or at any time, only to

the sum of Ninety-Three Hundred Sixteen and 94/100 Dollars ($9,316.94).

In this connection complainant alleges that the sum of [34] Fifty-Three Hundred Forty-Two and 90/100 Dollars ($5,342.90) and no more was applied on interest on the alleged primary obligation; that Sixty Thousand Four Hundred Ninety-Nine Dollars ($60,499.), including said Nine Hundred Fifty-Six and 36/100 Dollars ($956.36), was so applied on the principal of said alleged primary obligation, leaving a balance of One Dollar ($1.) thereon and no more. That the alleged primary obligation was stated at Sixty-Five Thousand Eight Hundred Forty-Two and 90/100 Dollars ($65,842.90). That the total collections were Sixty-Five Thousand Eight Hundred Forty-One and 90/100 Dollars ($65,841.90). That the actual primary obligation, including all interest due or allowable, was Sixty-One ThousandOne Hundred Five Dollars ($61,105.).

V.

Complainant admits that no part of said Ninety-One Hundred Thirty-Six and 94/100 Dollars ($9,136.94) has ever been paid by complainant to defendant, as for a balance due on said primary obligation. Complainant denies that there is any such balance due. Complainant alleges that the primary obligation has been paid and Forty-Seven Hundred Thirty-Six and 90/100 Dollars ($4,736.90) besides, not voluntarily but by the appropriation thereof without right on the part of defendant from the

collections and avails from the collaterals so posted with defendant and his predecessor bank. Complainant denies that any interest is due defendant on the alleged balance of Ninety-One Hundred Thirty-Six and 94/100 Dollars ($9,136.94) or on any sum either from October 21, 1936, or from any date or at all.

And for a Defense to Said Purported Defense, Counterclaim and New Matter, Complainant Says: [35]

I.

That at or about the time defendant stated the amount to the effect that there were collections aggregating Sixty-Five Thousand Eight Hundred Forty-One and 90/100 Dollars ($65,841.90) from the said Nine Hundred Fifty-Six and 36/100 Dollars ($956.36) credit and from the said collaterals and that Sixty Thousand Four Hundred Ninety-Nine Dollars ($60,499.) had been applied on principal and Fifty-Three Hundred Forty-Two and 90/100 Dollars ($5,342.90) applied on interest on the alleged primary obligation, the complainant altered its situation in consideration thereof and paid a dividend amounting to twenty-five per cent. (25%) on its stock (which said stock was in pro rata to the available assets compared to the outstanding deposit and other obligations of said insolvent bank) and arranged its affairs so as to make a further dividend of approximately the same amount, and the complainant denied to its stockholders and to creditors of said insolvent bank any and all interest on their claims from and after the date of

said insolvency, so that the defendant is now estopped to recompute or re-allocate or re-apply any of the collections or avails from the collaterals administered by it, in any other manner so as to change the said original primary endorsement of collections upon the original primary obligation herein mentioned. And complainant alleges that in like manner the defendant is estopped from cancelling, erasing, or changing the original endorsements made on collaterals or the allocation of credits on collaterals in the manner as appears from the change of the original sub-collateral endorsements compared to the revised sub-collateral endorsements. And in this connection complainant makes reference to and annexes hereto as complainant's exhibit in defense to said counterclaim the exhibit marked "Com- [36] plainant's Exhibit A on defense to counterclaim annexed hereto."

Complainant alleges further that included in said item of Fifty-Three Hundred Forty-Two and 90/100 Dollars ($5,342.90) was the sum of Thirteen Hundred Fifty-Six and 84/100 Dollars ($1,356.84) paid to the defendant and applied as interest on October 21, 1936, after funds were in the hands of the defendant available and sufficient to satisfy said primary obligation in full on the basis of the application originally made by the Reno National Bank and the defendant of the respective payments said to be received thereon. Reference to said statement of application is "Exhibit A" annexed hereto.

Wherefore complainant having answered the counterclaim (as a defendant on counterclaim) and having pleaded to and defended against the new matters appearing in the answer of the defendant, asks that defendant take nothing by reason of his said counterclaim, but that the complainant may have the judgment and relief originally sued for and such other and further relief as may be meet and just at law, in equity and good conscience and may have its costs in this action so wrongfully caused.

And the complainant as in duty bound will ever pray.

GUY C. SANFORD
A. L. HAIGHT
Attorneys for Complainant.

State of Nevada,
County of Churchill—ss.

E. W. Blair, being first duly sworn, deposes and says that he is the manager of the corpora- [37] tion complainant named in the foregoing reply; that he has read the said reply and knows the contents thereof; and that the same is true of his own knowledge except as to those matters therein alleged on information and belief and, as to those, that he believes it to be true.

E. W. BLAIR

Subscribed and sworn to before me this 16 day of December, A. D., 1937.

[Seal] BETTY MILLS
Notary Public. [38]

EXHIBIT "A"

Asset No. 552—LYON COUNTY BANK

DETAIL OF ORIGINAL AND REVISED ENDORSEMENTS

Date	Source of Funds	Amount	Original-Sub-Collateral Endorsement Principal Payment	Original-Sub-Collateral Endorsement Balance	Revised Sub-Collateral Endorsement Principal Payment	Revised Sub-Collateral Endorsement Balance	Original Primary Endorsement Principal Payment	Original Primary Endorsement Balance	Revised Primary Endorsement Principal Payment	Revised Primary Endorsement Balance
2-16-32	Deposit Bal Reno Nat Bk	$ 956.36	$	$	$	$	$ 956.36	$59,543.64	$ 956.36	$59,543.64
2-23-32	Philatro & Jones	1,000.00	1,000.00	14,500.00	1,000.00	14,500.00	1,000.00	58,543.64	1,000.00	58,543.64
3- 8-32	Mtg Sec. Corp Bond Coups	180.00					180.00	58,363.64	180.00	58,363.64
5- 3-32	Montelatici Interest	106.65					106.65	58,256.99	106.65	58,256.99
6- 1-32	" "	106.65					106.65	58,150.34	106.65	58,150.34
2- 6-33	Mtg Sec Corp Bond Coups	180.00					180.00	57,970.34		
2-23-33	H. E. Carter	3,765.56	3,765.56	3,522.44	3,765.56	3,522.44	3,765.56	54,204.78	3,765.56	54,384.78
2-23-33	E. S. Wedertz	4,919.00	4,919.00	4,175.00	4,919.00	4,175.00	4,919.00	49,285.78	4,919.00	49,465.78
2-27-33	L. L. Wedertz	4,080.25	4,080.25	2,707.75	4,080.25	2,707.75	4,080.25	45,205.53	4,080.25	45,385.53
5-10-33	Montelatici	20.00	20.00	7,980.00			20.00	45,185.53		
7- 8-33	Philatro & Jones	4,481.79	4,481.79	10,018.21	1,550.56	12,949.44	4,481.79	40,703.74	1,947.11	43,438.42
4-20-34	Montelatici	150.00	150.00	7,830.00			150.00	40,553.74		
4-26-34	Philatro & Jones	50.00	50.00	9,968.21			50.00	40,503.74		
11-30-34	Mtg Sec Corp Bonds	1,499.23	1,499.23	4,500.77	989.23	5,010.77	1,499.23	39,004.51	989.23	42,449.19
12-24-34	Montelatici	5,000.00	5,000.00	2,830.00	3,403.61	4,596.39	5,000.00	34,004.51	3,403.61	39,045.58
2-19-35	Philatro & Jones	4,135.78	4,135.78	5,832.43	2,334.82	10,614.62	4,135.78	29,868.73	2,334.82	36,710.76
2-25-35	" "	2.45	2.45	5,829.98			2.45	29,866.28		
4-19-35	" "	3,643.31	3,643.31	2,186.67	3,490.92	7,123.70	3,643.31	26,222.97	3,490.92	33,219.84
5-31-35	Yparraguirre	3,936.09	3,936.09	15,493.91			3,936.09	22,286.88	1,841.01	31,378.83
6-10-35	Walker River Bonds	14,306.16	14,306.16	7,693.84	10,419.50	11,580.50	14,306.16	7,980.72	14,236.42	17,142.41
7- 2-35	Philatro & Jones	456.74	456.74	1,729.93	324.97	6,798.73	456.74	7,523.98	372.94	16,769.47
10-24-35	H. E. Carter	2,000.00	2,000.00	1,522.44	1,247.06	2,275.38	2,000.00	5,523.98	1,582.70	15,186.77
1- 4-36	L. L. Wedertz	3,329.75	2,707.75	00	2,707.75	00	3,329.75	2,194.23	3,090.16	12,096.61
1-16-36	Philatro & Jones	100.00	100.00	1,629.93			100.00	2,094.23		
10-21-36	E. S. Wedertz	1,928.07	1,928.07	2,246.93	703.95	3,471.05	1,928.07	166.16	1,256.67	10,839.94
10-21-36	H. E. Carter	1,523.00	1,520.44	2.00	649.39	1,625.99	165.16	1.00	1,523.00	9,316.94
	Totals	$61,856.84	$59,702.62		$41,586.57		$60,499.00		$51,183.06	

		Amount	Interest Payment	Paid to	Interest Payment	Paid to	Interest Payment	Paid to	Interest Payment	Paid to
3- 8-32	Mtg Sec Corp Bond Coups		180.00	1- 1-32	180.00	1- 1-32				
5- 3-32	Montelatici Interest		106.65	8-20-31	106.65	8-20-31				
6- 1-32	" "		106.65	10-20-31	106.65	10-20-31				
6-30-32	Mtg Sec Corp Bond Coups	180.00	180.00	7- 1-32	180.00	7- 1-32	180.00	on account	180.00	on account
6-30-32	Walker River Bond Coups	660.00	660.00	1- 1-32	660.00	1- 1-32	660.00	on account	660.00	on account
7- 2-32	" " " "	660.00	660.00	7- 1-32	660.00	7- 1-32	660.00	" "	660.00	" "
7- 8-32	Montelatici Interest	106.65	106.65	12-20-31	106.65	12-30-31	106.65	" "	106.65	" "
8- 8-32	" "	106.65	106.65	2-20-32	106.65	2-20-32	106.65	" "	106.65	" "
8-13-32	Simpson Interest	110.00	110.00	12-31-31	110.00	12-31-31	110.00	" "	110.00	" "
9- 8-32	Montelatici Interest	106.65	106.65	4-20-32	106.65	4-20-32	106.65	" "	106.65	" "
10-14-32	" "	106.65	106.65	6-20-32	106.65	6-20-32	106.65	" "	106.65	" "
2- 6-33	Mtg Sec Corp Bond Coups		180.00	1- 1-33	180.00	1- 1-33			180.00	" "
2-23-33	H. E. Carter	574.44	574.44	2-23-33	574.44	2-23-33	574.44	" "	574.44	" "
2-23-33	E. S. Wedertz	866.25	866.25	2-23-33	866.25	2-23-33	866.25	" "	866.25	" "
2-27-33	L. L. Wedertz	507.77	507.77	2-27-33	507.00	2-27-33	507.77	" "	507.77	" "
5-10-33	Montelatici				20.00	on Acct.			20.00	" "
7- 8-33	Philatro & Jones				2,931.23	7- 8-33			2,534.68	7- 8-33
4-20-34	Montelatici				150.00	on acct.			150.00	on account
4-26-34	Philatro & Jones				50.00	" "			50.00	" "
11-30-34	Mtg Sec Corp Bonds				510.00	11-30-34			510.00	" "
12-24-34	Montelatici				1,596.39	12-24-34			1,596.39	" "
2-19-35	Philatro & Jones				1,800.96	2-19-35			1,800.96	" "
2-25-35	" "				2.45	on acct.			2.45	" "
4-19-35	" "				152.39	4-19-35			152.39	" "
5-31-35	Yparraguirre				3,936.09	on acct.			2,095.08	5-31-35
6-10-35	Walker River Bonds				3,886.66	6-10-35			69.74	6-10-35
7- 2-35	Philatro & Jones				131.77	7- 2-35			83.80	7- 2-35
10-24-35	H. E. Carter				752.94	10-24-35			417.30	10-24-35
1- 4-36	L. L. Wedertz		622.00	1- 4-36	622.00	1- 4-36			239.59	1- 4-36
1-16-36	Philatro & Jones				100.00	on acct.			100.00	on account
10-21-36	E. S. Wedertz				1,224.12	10-21-36			671.40	10-21-36
"	H. E. Carter		2.56	on acct.	873.61	"	1,357.84	on account		
	Totals	$ 3,985.06	$ 5,182.92		$23,118.97		$ 5,342.90		$14,658.84	

[Endorsed]: Filed Dec. 31st, 1937. [39]

[Title of District Court and Cause.]

MINUTES OF COURT OF THURSDAY, JUNE 16, 1938

This case having heretofore been tried on the merits, briefed, submitted to and by the Court taken under advisement, It Is Ordered that judgment enter for the defendant. The Court now files opinion and decision. [40]

In the District Court of the United States of America, in and for the District of Nevada.

No. 2721.

LYON COUNTY BANK MORTGAGE CORPORATION, a corporation,

Complainant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association,

Defendant.

OPINION AND DECISION.

Norcross, District Judge:

The Lyon County Bank, in pursuance of the laws of the State of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank. On December 12, 1932, the Reno National Bank was adjudged to be insol-

vent by the Comptroller of the Currency and W. J. Tobin was appointed and qualified as Receiver thereof. In pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the State banking laws, the State Banking Examiner transferred all property of the said Lyon Couny Bank to Lyon County Bank Mortgage Corporation, Complainant herein.

On July 1, 1931, said Lyon County Bank negotiated a loan from said Reno National Bank in the sum of $60,500.00 and executed a formal note therefor payable "on demand * * * with interest thereon at the rate of eight per cent per annum from [41] date until paid. Interest payable on demand, also after judgment". The Lyon County Bank also delivered to the Reno National Bank, pledged as collateral security, certain bonds and notes of a total face value in excess of the amount of the loan. At the time the Lyon County Bank was taken over by the State Bank Examiner, it had a deposit account with the Reno National in the sum of $956.36, which was later credited upon the note. Defendant's answer alleges that at the time the Reno National Bank was taken over by the receiver there was due as principal on said note the sum of $59,543.64. By its answer, Defendant admits the collection of $14,658.84, in the form of interest paid on pledged securities, and the application of such amount to the discharge of claimed accrued interest on the note of the Lyon County Bank. Complainant claims a balance due on principal of said note in the sum

of $9,316.94, together with interest thereon from October 21, 1936. Complainant alleges the total amount due upon principal and interest at the date the Lyon County Bank was taken over by the State Bank Examiner was $60,148.64; total payments received by Defendant in the sum of $65,841.90, and, hence, Defendant is indebted to Complainant in the sum of $4,736.90. Complainant prays judgment in this amount and for return of certain pledged securities and for general relief.

Questions of law presented upon the facts of this case are whether the amount of indebtedness of the Lyon County Bank to the Reno National Bank is finally determined as of the date of insolvency of the Lyon County Bank and its taking over by the State Bank Examiner and thereafter no interest would accrue thereon, which is the contention of Complainant, or whether where such indebtedness is secured by interest bearing pledges, interest derived therefrom may be applied in discharge of interest which does accrue thereon, which is the contention of Defendant. [42]

Upon the trial it appeared from exhibits introduced that Defendant had credited payments received upon collateral whether as principal or interest mainly upon the principal of the note and as so indorsed thereon the balance on the principal of the note as of October 21, 1936, was but one ($1.00) dollar and a balance due on interest as of that date in the sum of $7,698.52. Following receipt of a letter of date December 16, 1936, from the Execu-

tive Assistant Counsel of the Comptroller of the Currency, advising Defendant that—"Under the rule stated in the case of Gamble v. Wimberly, 44 F. (2d) 329, you are entitled to retain the pledged assets and apply toward interest due on your claim after suspension of the Lyon County Bank all income earned upon and collected from the pledged assets after the date of closing of the Lyon County Bank."—the Defendant made a revision of said previous indorsements resulting in a balance due on principal as of October 21, 1936, of $9,316.94.

The securities pledged by the Lyon County Bank consisted of six $1,000.00, First Lien Coupon Certificates of the Mortgage Security Corporation of America, of January 1, 1941 maturity; Twenty-two $1,000.00, Walker River Irrigation District First Issue, Series 1, 6% Bonds, maturity January 1, 1940; Six promissory notes, secured by mortgages, executed during the years 1930 and 1931, in the total principal amounts of $67,100.00.

It is Complainant's contention that the Lyon County Bank was not liable for interest upon its said note to the Reno Ntaional Bank after the date of its insolvency. Complainant relies on the provisions of sections 35 and 53 of the State Bank Act approved March 22, 1911, Nevada Compiled Laws 1929, Vol. I, section 650 et seq. Section 35 as amended March 2, 1931 reads:

> "No bank official shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security or otherwise;

provided, [43] *however,** that any bank may secure funds deposited with such bank by the United States, state, or counties of the state by pledging acceptable assets of the bank as collateral security; *provided further,* that any bank may borrow money for temporary purposes, not to exceed the amount of its paid-up capital, and may pledge any of its assets as collateral security therefor; *provided further,* that when it shall appear that a bank is borrowing habitually for the purpose of conducting its business, the bank examiner may require such bank to pay off such borrowed money. Nothing herein shall prevent any bank from rediscounting in good faith and indorsing any of its negotiable notes."

By section 53 it is provided:

"Whenever it shall appear * * * from any examination or report provided for in this act the examiner shall have reason to conclude that such bank is in an unsafe or unsound condition to transact the business of a bank, or that it is unsafe and inexpedient for such bank to continue in business, the examiner may forthwith take possession of the property and business of such bank and retain such possession until such bank shall resume business or its affairs be finally liquidated as herein provided. No

*Italics in this Opinion and Decision are by the Court.

> bank, corporation, firm or individual knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid * * *."

It is clear from the reading of section 35 that the Lyon County Bank was authorized to negotiate the loan in question and to "pledge any of its assets as collateral security therefor". There is nothing in the provisions of section 53, supra, that would affect pledged assets given to secure the payment of a note issued in pursuance of the provisions of said section 35. It has been contended that interest accruing upon the note after the insolvency of the Lyon County Bank was a liability "thereafter incurred within the meaning of said section 53". This contention is without merit as will hereafter appear.

The State Banking Act of March 24, 1909 made the following provision:

> "Sec. 48. The claims of depositors, for deposits, and claims of holders of exchange shall have priority over all other claims, [44] except federal, state, county and municipal taxes, and subject to such taxes, which at the time of closing of the bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership; upon

proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. * * *." See Washington-Alaska Bank v. Dexter Horton Nat. Bank, 263 F. 304, 310.

The case last cited involved the question whether the Washington-Alaska Bank was subject to the banking laws of the State of Nevada, said bank having been organized under the laws of the State of Nevada. The Circuit Court of Appeals of this Circuit held that the banking laws of Nevada were not applicable as the bank was doing business in the Territory of Alaska. So holding, the Court decided the question here presented in favor of the Dexter Horton National Bank as follows:

"A pledge which secures an interest-bearing debt secures the interest as much as the principal of the debt." (Citing authorities p. 306).

Commenting on the case last cited the Circuit Court of Appeals for this Ninth Circuit in Douglass v. Thurston County, 86 F. (2d) 899, 910, said:

"In support of his contention in favor of the allowance of interest after the bank's insolvency, the treasurer relies upon a single decision—that of Washington-Alaska Bank v. Dexter Horton Nat. Bank (C. C. A. 9) 263 F. 304, 306, 307. That case is easily distinguishable from the one at bar. There the national bank was the *plaintiff,* seeking to foreclose a lien on collateral given by a *state* bank. The national bank laws dealing with the question of

interest, after insolvency, on deposits held by a national bank, were therefore not involved in that suit."

In the case of Gamble v. Wimberly, 44 F. (2d) 329 the Circuit Court of Appeals for the Fourth Circuit, quoting from syllabus, held:

"Secured creditor of national bank in liquidating claims can retain interest and dividends accruing on collateral since date of debtor bank's insolvency (12 USCA §194)." [45]

The contention of Defendant respecting the claimed right to subject the pledged securities to the payment of interest accrued subsequent to the insolvency of the Lyon County Bank also finds support in the following authorities: Ticonic National Bank v. Sprague, 303 U. S. .....; Organ v. Winnemucca State Bank, 55 Nevada 72, 26 P. (2d) 237; 9 C. J. S. §389, 513, 537.

Judgment for Defendant.

Dated this 16th day of June, 1938.

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed June 16, 1938. [46]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant.

From the evidence introduced, the Court finds the facts as follows, to-wit:

I.

That Lyon County Bank, in pursuance of the laws of the State of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank; that on December 12, 1932, The Reno National Bank was adjudged to be insolvent by the Comptroller of the Currency, and W. J. Tobin was appointed and [47] qualified as Receiver thereof; that in pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the state banking laws, the State Banking Examiner transferred all property of said Lyon County Bank to Lyon County Bank Mortgage Corporation, complainant herein.

II.

That among the assets of The Reno National Bank, when defendant took possession thereof as Receiver, there was a note of the Lyon County

Bank upon which there was then due as principal the sum of $59,543.64.

III.

That to secure the payment of said note ,said Lyon County Bank had hypothecated to The Reno National Bank certain securities consisting of bonds, and notes secured by mortgage, as security for the payment of said principal obligation.

IV.

That payments aggregating the sum of $65,841.90 were received by the defendant and The Reno National Bank since February 16, 1932 on account of the indebtedness upon which a claim had been filed by defendant, and that of said sum, the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank.

V.

That after applying said sum of $14,658.84 to the payment of interest due on said primary obligation of the Lyon County Bank to The Reno National Bank up to the 21st day of October, 1936, and the balance remaining after the application of the interest, as aforesaid, on said primary obligation, and after the application of the balance of said sum of $65,841.90 remaining after deducting the said sum of $14,658.84 on said principal obligation, as aforesaid, [48] together with the sum of $956.36, which consisted of a balance due to the credit of the Lyon

County Bank in The Reno National Bank, said indebtedness was reduced to the sum of $9,316.94 on the 21st day of October, 1936.

VI.

That in addition to the sums above mentioned, the defendant, on October 29, 1937, collected on the pledged security of H. E. Carter the sum of $1,625.99, and on October 15, 1937, collected on the pledged security of E. S. Wedertz the sum of $1,095, leaving a balance of $6,595.95 owing from plaintiff to defendant; that the interest on the sum of $9,316.94 from the 21st day of October, 1936 to the 18th day of March, 1938, less deduction of interest on said payments, is the sum of $838.18, which said sum is now due, owing, unpaid and payable from the plaintiff to the defendant.

VII.

That no evidence was introduced as to the allegations set forth in what is termed by plaintiff: "And for a Defense to said Purported Defense, Counter-Claim and New Matter", and that therefore there was no evidence upon which to base a finding as to said allegations.

As Conclusions of Law from the foregoing facts, the Court finds:

That plaintiff is indebted to the defendant in the sum of $7,434.13, and that defendant have judgment against the plaintiff in the said sum of $7,434.13, together with interest at the rate of 8% per annum

from the 18th day of March, 1938, and for costs of suit; and

It Is Ordered that judgment be entered herein in accordance herewith.

Dated: August 10th, 1938.

FRANK H. NORCROSS

District Judge.

[Endorsed]: Lodged Aug. 2, 1938. Filed Aug. 10, 1938. [49]

[Title of District Court and Cause.]

JUDGMENT.

This cause came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant.

Whereupon, witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties. The evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court filed its Findings and Decision in writing and ordered that judgment be entered herein in favor of the defendant in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, [50] It Is Ordered, Adjudged and De-

creed that W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, defendant, do have and recover of and from Lyon County Bank Mortgage Corporation, a Corporation, plaintiff, the sum of $7,434.13, with interest thereon at the rate of 8% per annum from the 18th day of March, 1938, together with defendant's costs and disbursements incurred in this action amounting to the sum of $58.44.

Dated: August 10th, 1938.

(Signed) FRANK H. NORCROSS
Judge of the United States District Court for the District of Nevada.

Sept. 2, 1938—This Judgment ordered set aside as inadvertently made.

O. E. BENHAM,
Clerk.

[Endorsed]: Lodged Aug. 2, 1938. Filed Aug. 10, 1938. [51]

[Title of District Court and Cause.]

COMPLAINT TO RECOVER ON PROMISSORY NOTES

Aug. 10, 1938. Fil. & ent'g. judgment.

(Note: The above is in accordance with item No. 7 of Appellant's Praecipe, showing the notation on the docket of the filing and entering of the judgment of August 10, 1938.) [52]

[Title of District Court and Cause.]

MINUTES OF COURT OF SEPTEMBER 2, 1938.

* * * The Court: "Ordered that the findings of fact and conclusions of law and judgment made and entered on the 10th day of August, 1938, be, and the same hereby are, set aside as having been inadvertently made and entered, and It Is Further Ordered that defendant's proposed findings of fact, conclusions of law and form of judgment, lodged with the Court on August 2, 1938, and plaintiff's objections to defendant's proposed findings and judgment and plaintiff's proposed findings and judgment, filed Aug. 11th, 1938, stand submitted to the Court for consideration and decision." [53]

[Title of District Court and Cause.]

MINUTES OF COURT OF SEPTEMBER 8, 1938.

On this day the Court makes the following order, to-wit: "Ordered the order of Sept. 2nd, 1938, be, and the same hereby is, confirmed. The Court has considered the findings of fact, conclusions of law and judgment submitted by the defendant, the objections thereto and proposed findings of fact and conclusions of law submitted by and on behalf of the plaintiff, and the Court at this time presents for filing the Court's findings of fact and conclusions of law." * * *

* * * * * * *

The defendant is granted exceptions to the changes and modification made in the findings proposed by the defendant, and also to the modification and form of judgment. The plaintiff is granted an exception to any change made with respect to the findings of fact proposed by the plaintiff or any failure to include such proposed findings, and also an exception to the request of plaintiff for the entry of judgment in favor of the plaintiff. Ordered that if either party should desire any additional form of exceptions they may be called to the attention of the Court and entered at any time. [54]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant.

From the evidence introduced, in addition to admissions made by the pleadings or supplementary thereto, the Court finds the facts as follows:

I.

That the Lyon County Bank, in pursuance of the laws of the State of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank; that on

December 12, 1932, The Reno National Bank was adjudged to be insolvent by the Comptroller of the Currency, and W. J. Tobin was appointed and qualified as Receiver thereof; that in pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the state banking laws, the State Banking Examiner transferred all property of said [55] Lyon County Bank to Lyon County Bank Mortgage Corporation, complainant herein.

II.

That on February 16th, 1932, when the said Lyon County Bank was declared insolvent and was taken over by the state bank examiner, The Reno National Bank held and owned a demand note of Lyon County Bank dated July 1, 1931, for $60,500., with interest at 8% per annum; interest paid to January 1, 1932. That on said February 16th, 1932, the said Lyon County Bank had on deposit with said The Reno National Bank the sum of $956.36; that on February 16, 1932, there was due and unpaid upon said note the sum of $60,500. principal and $605.00 interest, making a total of $61,105; that the said The Reno National Bank offset the said $956.36 against the said principal obligation, leaving a balance of $59,543.64 principal, and unpaid interest on said note from January 1st, 1932; That between February 16, 1932, and June 2, 1932, The Reno National Bank applied upon the said note from avails collected of securities held by it the further sum of $1393.30; applying the same upon the principal of the note; that on September 1,

1932, The Reno National Bank filed a claim against the insolvent, Lyon County Bank, for the sum of $58,150.34 principal on note, together with interest.

III.

The Lyon County Bank on July 22, 1931, hypothecated to The Reno National Bank certain securities consisting of bonds, and notes secured by mortgages as security for the payment of all the indebtedness of Lyon County Bank to The Reno National Bank existing on the last-mentioned date, as well as all the future indebtedness to the said The Reno National Bank which the Lyon County Bank might thereafter incur. That at the time said promissory note of $60,500. was given and at the time said collateral security agreements were made the Nevada Banking Act of 1911 and Sections 35, 53, and 72 thereof, and all of said act was in full force and effect. [56]

IV.

Payments aggregating $65,841.90 were received by The Reno National Bank and the defendant to October 21, 1936, as avails and proceeds from the said collaterals and securities, including the collection of $956.36 of the credit balance of Lyon County Bank standing on open account and including other sums, in the period from February 16, 1932, to and including October 21, 1936. Interest accrued and was collected and retained by the said bank and defendant, being avails and proceeds from the said collaterals and securities covering the period from February 16, 1932, to and including October 21,

1936, in the total amount of $2930.75 as follows, to-wit:

June 30, 1932,	Mortgage Security Corporation bond coupons,	$ 134.00
July 2nd, 1932,	Walker River Irrigation District bond coupons,	498.67
Feb. 6, 1933,	Mortgage Security Corporation bond coupon,	180.00
Feb. 23, 1933,	H. E. Carter, interest on loan,	446.11
Feb. 23, 1933,	E. S. Wedertz, " " "	640.75
Feb. 27, 1933,	L. L. Wedertz, " " "	406.66
Jan. 1, 1936,	L. L. Wedertz, " " "	622.00
Oct. 21, 1936,	H. E. Carter, " " "	2.56
		$2,930.75

V.

That payments aggregating the said sum of $65,-841.90 were received by the defendant and The Reno National Bank since February 16, 1932 on account of the indebtedness upon which a claim had been filed by defendant, and that of said sum, the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank.

VI.

That after applying said sum of $14,658.84 to the payment of interest due on said primary obligation of the Lyon County Bank to The Reno National Bank up to the 21st day of October, 1936, and the balance remaining after the application of the interest, as aforesaid, on said primary obligation, and [57] after the application of the balance of said sum of $65,841.90 remaining after deducting the said sum of $14,658.84 on said principal obliga-

tion, as aforesaid, together with the sum of $956.36, which consisted of a balance due to the credit of the Lyon County Bank in The Reno National Bank, said indebtedness was reduced to the sum of $9,316.94 on the 21st day of October, 1936.

VII.

That in addition to the sums above mentioned, the defendant, on October 29, 1937, collected on the pledged security of H. E. Carter the sum of $1,625.99, and on October 15, 1937, collected on the pledged security of E. S. Wedertz the sum of $1,095.00, leaving a balance of $6,595.95 owing to defendant; that the interest on the sum of $9,316.94 from the 21st day of October, 1936, to the 18th day of March, 1938, less deduction of interest on said payments, is the sum of $838.18, which said sum is now due, owing and unpaid to the defendant.

VIII.

Upon the trial it appeared from exhibits introduced that defendant had credited payments received upon collateral whether as principal or interest mainly upon the principal of the note and as so indorsed thereon the balance on the principal of the note as of October 21, 1936, was but one ($1.00) dollar and a balance due on interest as of that date in the sum of $7,698.52. Following receipt of a letter of date December 16, 1936, from the Executive Assistant Counsel of the Comptroller of the Currency, the defendant made a revision of said prev-

ious indorsements resulting in a balance due on principal as of October 21, 1936, of $9,316.94.

As conclusions of law from the foregoing facts, the Court finds:

That interest continued to accrue on the said note of the Lyon County Bank, held by the Reno National Bank, after said [58] Lyon County Bank became insolvent and was taken over by the State Bank Examiner, and that the said pledged securities held by the Reno National Bank were subject to be disposed of by the Reno National Bank and the Defendant, Receiver thereof, and the proceeds of such pledged securities applied to the discharge of both the principal and accrued and accruing interest on said note.

That at the time of the institution of this suit and at the time of the trial thereof the principal and accrued interest upon said note had not been fully discharged.

That plaintiff is not entitled to any judgment against defendant. Defendant is entitled to judgment against plaintiff for his costs of suit.

It is ordered that judgment be entered herein in accordance herewith.

Dated this 8th day of September, 1938.

FRANK H. NORCROSS
District Judge.

[Endorsed]: Filed Sept. 8, 1938. [59]

[Title of District Court and Cause.]

JUDGMENT.

This cause came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant.

Whereupon, witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties. The evidence being closed, the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court filed its Findings and Decision in writing and ordered that judgment be entered herein in favor of the defendant in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, It Is Ordered, Adjudged and Decreed that plaintiff [60] take nothing by its action and that defendant have judgment against plaintiff for his costs and disbursements incurred in this action in the sum of $58.44.

Dated this 8th day of September, 1938.

FRANK H. NORCROSS
Judge of the United States District Court for the District of Nevada.

[Endorsed]: Filed September 8, 1938. [61]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

Lyon County Bank Mortgage Corporation, a corporation, the complainant herein, believing itself aggrieved by the final decree and judgment made and entered in the above entitled cause, dated the 16th day of June, 1938, and filed herein the 16th day of June, 1938, and the formal judgment entered herein on the 8th day of September, 1938, does hereby appeal to the United States Circuit Court of Appeals for the Ninth District, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this, its appeal, may be allowed, and that a citation may be issued herein as provided by law and directed to the defendant herein commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to do and receive what may appertain to justice to be done in the premises, and that a transcript, record, proceedings and documents upon which decree and judgment was based, be duly authenticated and sent to the United States Circuit Court of [62] Appeals for the Ninth Circuit, sitting at San Francisco, California, in accordance with the rules of such court in such cases made and provided.

And your petitioner, the complainant herein, further prays, that an order of this court be entered allowing this appeal to be taken, upon the filing of a bond given and filed herewith in the sum of Three

Hundred Dollars ($300.) or such other sum as the court may by order designate and require.

Dated this 14th day of September, 1938.

A. L. HAIGHT
GEORGE L. SANFORD
Attorneys and Solicitors for Complainant, Lyon County Bank Mortgage Corporation, a corporation.

Received a copy of the foregoing appeal and petition for allowance of appeal this 15th day of September, 1938.

N. J. BARRY
Attorney and Solicitor for defendant W. J. Tobin, etc.

[Endorsed]: Filed September 14, 1938. [63]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the above-named complainant, Lyon County Bank Mortgage Corporation, a corporation, by and through its attorneys and solicitors and respectfully submits the following assignment of errors, upon which it relies in support of its appeal from and prayer for reversal of, the judgment and decree made and entered in the above-entitled cause, dated the 16th day of June, 1938, and filed on the 16th day of June, 1938, and the judgment entered in said action September 8, 1938, in the District

Court of the United States for the District of Nevada, and says that in the findings, conclusions, and in said decree and judgment in said cause, there is manifest error, and for error the complainant assigns the following:

I.

The court erred in ordering judgment for defendant. [64]

II.

The court erred in awarding, giving and entering judgment for defendant.

III.

The court erred in refusing to enter the judgment for the Complainant as prayed for in the complaint.

IV.

The court erred in failing and refusing to find and adjudge that no interest on the indebtedness of Lyon County Bank to The Reno National Bank was payable, or could be charged or collected by The Reno National Bank, and that The Reno National Bank had no lien for any such charge, at any time, or for any period, after Lyon County Bank became insolvent and was taken over by the State Bank Examiner and The Reno National Bank had notice thereof.

V.

The court erred in finding and adjudging that after Lyon County Bank became insolvent and was taken over by the State Bank Examiner and

The Reno National Bank had notice thereof, The Reno National Bank had the right to apply the avails from the collaterals deposited with it, to the discharge of any alleged interest computed over such subsequent period upon the amount of the indebtedness of Lyon County Bank as of the day the Lyon County Bank became insolvent and was taken over by the bank examiner and The Reno National Bank had notice thereof.

VI.

The court erred in finding and adjudging that it appeared from the exhibits in evidence, or was true, that after the defendant credited avails from collaterals mainly upon the principal of the note or indebtedness of Lyon County Bank that the balance due on the principal was one dollar ($1) and the balance due on the interest was $7698.52, both as of October 21, 1936; and the [65] court erred in finding and adjudging that following the receipt of a letter of date December 16, 1936, from the Executive Assistant Counsel of the Comptroller of the Currency, the defendant made a revision of said previous endorsements "resulting in a balance due on principal as of October 21, 1936 of $9316.94," whereas in fact and in law said revision was not in conformity with said letter and said revision was not legal or proper and was incompetent to change the amount lawfully due by said Lyon County Bank to The Reno National Bank on October 21, 1936 or fix it in the sum of $9316.94 or other sum, except as alleged in the complaint.

VII.

The court erred in finding and adjudging that interest computed on the indebtedness of Lyon County Bank to The Reno National Bank, as it stood on the day the Lyon County Bank became insolvent and was taken over by the State Bank Examiner to the knowledge of The Reno National Bank was not a "liability thereafter incurred" or that it was not such a liability respecting which Section 53 of the State Banking Act, approved March 22, 1911 (N. C. L. 1929 Sec. 702) provides among other things that

> "* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *"

And the court erred in finding and adjudging by implication that the collaterals of the Lyon County Bank so deposited with The Reno National Bank were not assets of The Lyon County Bank.

VIII.

The court erred in finding and adjudging by implication that the National Banking law and/or the National Bankruptcy [66] laws apply to this case.

IX.

The court erred in finding and deciding and adjudging and in basing its findings and judgment on the theory applied to this case that a secure creditor has the right to retain collaterals and to charge interest on the indebtedness existing at the time of insolvency of a state bank and to apply the avails of such collaterals to the total principal and interest so charged and to retain the collaterals until the entire debt with the said interest is fully paid, in the face of the provisions of said Section 53 of the State Banking Act of 1911 and in the face of the collateral-security agreement between the parties, dated July 22, 1931, as affected by said statute.

X.

The court erred in finding and adjudging that the said collateral-security agreements of July 22, 1931 were given to secure or did or do secure, the payment of any interest on the indebtedness of Lyon County Bank as it stood when said bank became insolvent and was taken over, as aforesaid, computed for any period after the said day of insolvency, taking over with knowledge as aforesaid.

XI.

The court erred in failing and refusing to find and adjudge that the so-called revision of credits and endorsements on the note of Lyon County Bank was illegal, improper and inadmissible and without the consent or authority of Lyon County Bank and

was made to the detriment of Lyon County Bank and defendant was and is estopped to make or rely on any such so-called revisions.

XII.

The court erred in refusing to make the special findings timely requested by the complainant, notwithstanding such requested findings are supported by the weight of the evidence and the [67] evidence would support no finding or conclusion other than that requested by the complainant.

XIII.

The court erred in failing to find or adjudge on the material issue, drawn in issue, respecting the legality of and warrant or lack thereof, for the so-called recasting and revising and re-allocation of credits on the collaterals and on the primary obligation in accounting for the avails from the said collaterals, or the sufficiency of said accounting.

XIV.

The court erred in refusing and failing to give effect to the provisions of Section 35 of the Banking Act of Nevada of 1911 being N. C. L. 1929 Sec. 664 and in finding and deciding and adjudging that to pay interest on the indebtedness of the Lyon County Bank to The Reno National Bank as it stood when the Lyon County Bank became insolvent and was taken over by the bank examiner, would not constitute giving a preference to a creditor, which is prohibited by law.

Dated September 14, 1938.

A. L. HAIGHT
GEORGE L. SANFORD
Attorneys for Complainant.

Received a copy of the foregoing Assignment of Errors this 15th day of September, 1938.

N. J. BARRY
Attorney and Solicitor for defendant W. J. Tobin, etc.

[Endorsed]: Filed Sept. 14, 1938. [68]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL.

This action coming on to be heard this 14th day of September, 1938, upon the petition of Lyon County Bank Mortgage Corporation, a corporation, complainant, for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with complainant's assignment of errors, and the court being fully advised, it is

Hereby Ordered that an appeal to the United States Circuit Court of Appeals, for the Ninth District, from the final judgment made and entered in this action, dated June 16, 1938, and filed June 16, 1938, and the formal judgment made and entered in this action September 8, 1938, be, and the same is hereby allowed and that a certified transcript of the record, proceedings and documents upon which said judgment was made be transmitted to said

United States Circuit Court of Appeals, for the Ninth Circuit; and it is

Further Ordered that said appeal be allowed upon the filing of an appeal bond by the complainant in the penal sum of Three Hundred Dollars ($300.00) approved by [69] this court.

Further Ordered that the time for the filing and serving complainant's bill of exceptions and complainant's praecipe to the clerk for copies of the record and for the service of all citations, be, and the same is hereby enlarged and extended to and including the 17th day of October, 1938.

Dated September 14, 1938.

FRANK H. NORCROSS
District Judge.

Service of a copy of the foregoing order is hereby acknowledged this 15th day of September, 1938.

N. J. BARRY
Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1938. [70]

[Title of District Court and Cause.]

ORDER RESERVING JURISDICTION AND EXTENDING TIME.

Good Cause Appearing, it is hereby ordered that jurisdiction of the above entitled action and the judgment term of this court be and are hereby reserved and continued into and through the

October, 1938, term of this court, for all purposes connected with the above entitled action.

Dated this 14th day of September, 1938.

FRANK H. NORCROSS
District Judge.

Service by copy of the foregoing order is hereby acknowledged this 15th day of September, 1938.

N. J. BARRY
Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1938.

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men By These Presents: That Lyon County Bank Mortgage Corporation, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a Maryland corporation, as surety, are held and firmly bound unto W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, and his successors and assigns, in the sum of Three Hundred Dollars ($300.00), lawful money of the United States of America, to be paid unto the said obligee, his successors or assigns, to which payment, well and truly to be made, we do bind and oblige ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of September A. D. 1938.

Whereas, lately at a term of the District Court of the United States for the District of Nevada, a final judgment was [72] entered against the complainant and principal above named that the complainant take nothing by its said action therein, and that defendant have judgment for costs, all as therein specified, and

Whereas, said complainant and principal above named has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment,

Now, Therefore, the condition of this obligation is such that if the above named, Lyon County Bank Mortgage Corporation, a corporation, shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea and if it fails to sustain its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

LYON COUNTY BANK MORTGAGE CORPORATION a Corporation, Principal.

By C. E. BLAIR
Its manager, hereunto duly authorized.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
Surety

[Seal] By A. L. HAIGHT
Its Attorney-in-Fact.

The within, annexed, and foregoing bond is hereby approved both as to sufficiency and form, this 14th day of September, 1938.

FRANK H. NORCROSS
District Judge.

Received a copy of the foregoing Cost Bond on Appeal this 15th day of September, 1938.

N. J. BARRY
Attorney and Solicitor for defendant W. J. Tobin, etc.

[Endorsed]: Filed Sept. 14, 1938. [73]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE.

State and District of Nevada,
County of Ormsby—ss.

Homer Mooney being first duly sworn deposes and says: that he is a male citizen of the United States over the age of 21 years and not interested in the outcome of the above entitled action; that on the 14th day of September, 1938, at about the hour of 12 o'clock noon on said day at the request of George L. Sanford, one of the attorneys for the complainant above named, he, the deponent, delivered to Mary Thompson, a clerk in the office of N. J. Barry, attorney for the defendant, in the office of said N. J. Barry, in the Clay Peters Bldg., Reno,

Nevada, certain original papers and files in said action and certain certified copies of the same as hereinafter set forth; that at said time the said N. J. Barry was absent from said office and said Mary Thompson stated to affiant that said N. J. Barry would return to his office late that afternoon, probably, and would sign an acknowledgment of service of said papers on the same and would forward the said [74] papers so signed to the clerk of the above entitled court.

That the original papers hereinabove mentioned are as follows:

Complainant's objections filed September 14, 1938;

Complainant's petition for allowance of appeal filed September 14, 1938;

Complainant's assignment of errors, filed September 14, 1938;

Order allowing appeal, fixing bond and extending time, signed and filed September 14, 1938;

Order reserving jurisdiction signed and filed September 14, 1938;

Cost bond on appeal, executed, made, signed and approved and filed September 14, 1938;

Citation on appeal issued September 14, 1938.

That the certified copies delivered as aforesaid were certified copies of the above described original papers.

Deponent deposes further that the said original citation on appeal was duly returned and filed in court September 16, 1938, and bears the acknowledgment of receipt of copy signed by N. J. Barry, attorney for defendant, dated Septemebr 15th, 1938. That the other papers have been returned to the clerk of the court and bear the acknowledgment of receipt of copy signed by N. J. Barry aforesaid, dated September 15, 1938.

Further than this deponent saith not.

HOMER MOONEY.

Subscribed and sworn to before me this 16th day of September, 1938.

[Seal] MABEL H. STEWART

Notary Public, Ormsby County, Nevada.

My Commission Expires Jan. 17, 1941.

[Endorsed]: Filed Sept. 16, 1938. [75]

[Title of District Court and Cause.]

COMPLAINANT AND APPELLANT'S BILL OF EXCEPTIONS AND STATEMENT OF THE EVIDENCE.

Be It Remembered that the above-entitled cause came on regularly for trial before Honorable Frank H. Norcross, United States District Judge presiding, a jury being waived, in the above-entitled court, on March 18, 1938, and was tried before said court on that day upon the issues made by the bill

of complaint or declaration, the answer and the reply; that plaintiff lodges this bill of exceptions and statement of the evidence in said cause, to-wit:

W. J. TOBIN

was called by the plaintiff as an adverse witness and was duly sworn and testified as follows:

I have been receiver of The Reno National Bank since [76] December 9, 1932. This (indicating the document now represented by Exhibit 1) is the original note executed by the Lyon County Bank of $60,500. The notations here represent payments that were made and in some instances the notations indicate from what source payments were derived. Some of them were credited upon principal and some upon interest as shown upon the two sheets. Apparently some interest applications were made after the suspension of The Reno National Bank. The note shows the manner of crediting the payments. It shows as of October 21, 1936 a principal balance due of one dollar and interest due of $9056.36.

(Plaintiff's Exhibit No. 1 was offered and received in evidence and by stipulation a copy was filed in place of the original note and annexes.)

(Testimony of W. J. Tobin.)

PLAINTIFF'S EXHIBIT NO. 1.

COPY

$60,500.00 Reno, Nevada, July 1, 1931

On Demand after date, without grace, for value received, Lyon County Bank a corporation, promises to pay to The Reno National Bank or order, at its banking office in Reno, Navada, The sum of Sixty Thousand Five Hundred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on Demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holders to them or either of them, or to the maker thereof. In the event of non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or

(Testimony of W. J. Tobin.)

any of its property may be situated, at the option of the holder.

[Seal] In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

By GEO F. WILLIS,
Secretary.

LYON COUNTY BANK
By J. I. WILSON
President.

No. 5166.

Form 188 [77]

(ON BACK)

	Endorsements on Principal	
Date	Amount	Bal. due on Prin.
2-23-32	$ 1,000.	$59,500.00
3- 3-32	956.36	58,543.64
3- 8-32	180.00	58,363.64
5- 3-32	106.65	58,256.99
6- 1-32	106.65	58,150.34
2- 6-33	180.00	57,970.34
2-23-33	3,765.56	54,204.78
2-23-33	4,919.00	49,285.78
2-27-33	4,080.25	45,205.53
5-10-33	20.00	45,185.53
7- 8-33	4,481.79	40,703.74
4-20-34	150.00	40,553.74
4-20-34	50.00	40,503.74
11-30-34	1,499.23	39,004.51
12-24-34	5,000.00	34,004.51
2-19-35	4,135.78	29,868.73
2-25-35	2.45	29,866.28

(Testimony of W. J. Tobin.)

4-19-35		3,643.31	26,222.97
5-31-35		3,976.88	22,246.09
6-10-35		14,306.16	7,939.93
6-17-35	(Red ink)	40.79	7,980.72
7- 2-35		456.74	7,523.98
10-24-35		2,000.00	5,523.98
1- 4-36		3,329.75	2,194.23
6-16-36		100.00	2,094.23
10-21-36		2,093.23	1.00

Endorsements on Interest

12-16-31		2,420.00	to 12-31-31
6-30-32		180.00	on acct.
6-30-32		660.00	"
7- 2-32		660.00	"
7- 8-32		106.65	"
8- 8-32		106.65	"
8-13-32		110.00	"
9- 8-32		106.65	"
10-14-32		106.65	"
2-23-33		574.44	"
2-23-33		866.25	"
2-27-33		498.00	to 11-5-32
2-27-33		9.77	on acct.
10-21-36	Balance due on Interest	$9,056.36	
10-21-36		1,357.84	on Acct.
	Balance due on Interest	7,698.52	

There were some interest applications after the suspension of The Reno National Bank. At the time the note was made or a short time thereafter there were certain securities that were [78] transferred to The Reno National Bank and pledged as collateral for the loan.

There were $6000 first lien certificates of the Mortgage Securities Corporation of America,

(Testimony of W. J. Tobin.)

Series B-10 of January 1, 1941 maturity, numbers 9505-9510 inclusive.

On March 8, 1932 the bank received a payment of $180. That was interest coupons. The Reno National Bank applied it as a principal payment on the Lyon County Bank note. The next payment was on June 30, 1932 account Mortgage Securities Corporation. That was applied on the interest on the note. I assume it represented the current interest from January 1, 1932 to July 1, 1932.

On February 6, 1933 the next payment was made on this security, $180. That covered interest from July 1, 1932 to January 1, 1933. That payment was applied on the principal of the original note of $60,500.

November 30, 1934 I sold those bonds for $1499.23. That amount was originally endorsed upon the original Lyon County note as a principal payment.

On the Walker River bonds which were turned over by Lyon County Bank on July 22, 1931 to The Reno National Bank there was a payment June 10, 1935 of $14,306.16. But the first one was $660 which was interest on these bonds, presumably. The interest covered was the six months to January 1, 1932. That was applied as an interest payment and it was applied on June 30, 1932. The next payment of $660.00 was July 2, 1932 which was interest—apparently, paid to July 1, 1932, the succeeding six

(Testimony of W. J. Tobin.)

months. That payment was applied as interest upon the original Lyon County note of $60,500.

The next transaction under this security was on June 10, 1935. It was $14,306.16 applied on principal. That closed the transaction so far as the bonds were concerned.

The amount on the Montelatici note was $8000 secured by [79] mortgage. The first payment on the note was May 3, 1932 in the amount of $106.65. The Montelatici note was dated June 20, 1930. The $106.65 paid the interest to August 20, 1931. It was from June 20, 1931 to August 20, 1931.

On June 1, 1932 the record shows payment of $106.65. That was applied, according to the records, as an interest payment covering interest to October 20, 1931. The entry of June 1, 1932, while that was interest, was applied as a principal payment on the Lyon County note for $60,500.

The next payment was on July 8, 1932—$106.65. That amount was applied as a principal payment upon the Lyon County (Bank) note.

The next payment was on August 8, 1932—$106.65 and that was applied as interest on the Montelatici note and it was applied on the Lyon County Bank note as a principal payment.

The next payment was September 8, 1932—$106.65.

On July 8, 1932, August 8, 1932, September 8, 1932 and October 14, 1932—on each of these four dates—there was $106.65 paid on the Montelatici

(Testimony of W. J. Tobin.)

note, and this amount was applied as interest upon the Lyon County Bank note of $60,500.

On May 10, 1933 there was a twenty-dollar principal payment on the Montelatici note and on the principal of the primary note of the Lyon County bank.

On April 23, 1934 a payment of $150 was credited on principal in both cases.

December 24, 1934 the sum of $5000 was credited —$5000 on the principal of the Montelatici note— $5000 on the principal of the primary Lyon County bank note.

The Yparraguirre note is dated June 15, 1931 in the original amount of $24,800, with interest at 8% payable semi-annually. No interest and endorsements had been made up to February 16, 1932. [80]

The first original endorsements was February 23, 1933—$1788, $1788, and $1794—three on the same day. That was applied as a principal payment. I don't see now the application of these amounts on the primary note of the Lyon County bank of $60,500.

On May 31, 1935 there is an endorsement of a payment of $3936.09. That was realized from the sale of real estate that we had a mortgage on that belonged to Yparraguirre. That was entered as a principal credit on the Yparraguirre note and was originally endorsed as a principal payment upon the primary note of Lyon County bank of $60,500. There were three notes by H. E. and Rowena

(Testimony of W. J. Tobin.)

Carter, $1788; L. L. and Juanita Wedertz, $1788; and Elmer and Cora Wedertz, $1794, representing sheep belonging to Yparraguirre (Accountable to us). They explain the principal endorsement on the Yparraguirre note made February 23, 1933.

The David Jones note has been paid and returned and we don't have it. I have a notation that it was dated February 27, 1930—$16,500—interest 8%. The interest had been paid to February 27, 1931. According to the original endorsement there was a payment on February 23, 1932 in the amount of $1000. It was applied as principal on the primary obligation and to principal on the collateral. I couldn't say when that interest was paid to February 27, 1931. I haven't the note here.

The next payment was received upon this (Jones) note July 8, 1933. It amounted to $4481.79. I couldn't say if it was received upon refinancing through the R. A. C. C. There was refinancing. That was applied upon the Jones note as principal and went on principal on the primary obligation of the Lyon County Bank.

On April 26, 1934 the sum of $50 was paid and applied on principal in both instances. The next payment was February 19, 1935. I imagine it was in final liquidation of that asset. We [81] had to take over the outfit—the sale of the sheep. The amount of that payment February 19, 1935 was $4135.78—applied on principal in both instances. Following payments are tabulated as follows:

(Testimony of W. J. Tobin.)

February 25, 1935	$ 2.45
April 19, 1935	3643.31
January 16, 1936	100.00
April 2, 1935	456.74

All these were applied on principal in both cases (on principal of the collateral note and on principal of the primary note of Lyon county bank of $60,500).

The last payment of $100, January 16, 1936, we accepted as a compromise of the remaining indebtedness after all the property had been liquidated. We accepted it in full discharge of that note and obligation, with the consent of the Lyon County Bank. I am quite sure we have such a consent.

The L. L. Wedertz note was dated May 15, 1931 —$5,000—interest 8%.

February 27, 1935 there was $4080.25 paid and endorsed as a principal payment on the collateral and on the primary obligations.

On January 4, 1936 there was $3329.75 paid and $2707.75 was endorsed as a principal payment on the Wedertz note and $622. was applied as interest, and the full amount $3329.75 was applied upon the principal of the main obligation.

There is $507.77 interest applied February 27, 1933—applied as interest on the collateral note of L. L. Wedertz and applied as interest on the primary obligation. It actually makes the payment made on February 27, 1933, $4588.02 instead of

(Testimony of W. J. Tobin.)

$4080.25. There was that much realized on that date.

The H. E. Carter note was dated May 1, 1931—$5500—interest 8%.

The first payment on that note was February 23, 1933— [82] $3765.56—applied as principal payment on the collateral note and on the primary obligation. Upon the same date there was received and applied upon the interest $574.44 and it paid the interest from May 1, 1931 to February 23, 1933 on the collateral. October 24, 1935, $2000. was received and applied on the principal of the collateral and the principal of the primary obligation. October 21, 1936—$1523. of which $1520.44 was applied on the principal of the Carter indebtedness and $2.56 on the interest. On the primary obligation of the Lyon County Bank $165.16 was applied on principal and $1357.84 was applied on interest. On the Carter note the entire sum was applied on the principal—all but $2.56. The Carter note ($1788) held as collateral for the Yparraguirre note, because of sale of sheep, accounts for the difference in the collections.

On October 29, 1937 I collected $873.05 from Carter—a payment made by the Nevada Live Stock Credit. It was the balance due on those obligations. This is being held in cash pending the outcome of this litigation. I returned the Carter note under an understanding with the Lyon County Bank that it was satisfactory to cancel and return the note.

(Testimony of W. J. Tobin.)

The E. S. Wedertz note was dated February 27, 1931—$7300 at 8%. As of February 16, 1932 there does not appeal to be any endorsement on the original note of interest payment and there is nothing prior to 1932. The first endorsement on the note of any payment is February 24, 1933 when there was $866.25 interest endorsed and $4819.00 principal. There was *$4919* applied on the principal and $866.25 applied as interest on the primary obligation—on the Lyon County Bank note and on the Wedertz note—the same way.

On October 21, 1936, the next payment, there was $1928.07 paid and of that amount $135.07 went on the Wedertz original indebtedness (that is the $7300 note) and $1793 was applied on the [83] note taken for Yparraguirre sheep and the full amount was endorsed on the principal of the primary obligation of the Lyon County Bank. It was applied upon the principal of the sub-collateral in each case—also upon the principal of the primary obligation of the Lyon County bank.

The next payment was November 15, 1937, after the suit started. Amount $1095—and by an understanding with the plaintiff it was applied as a principal payment on the sub-collateral.

As to an item on August 13, 1932 of "Simpson interest"—$110, my explanation from the records is that if the interest on the F. W. Simpson obligation of $5000 (which is not a part of the claim or involved in this case) was paid twice—once by

(Testimony of W. J. Tobin.)

Simpson and once by Lyon County Bank—that the Lyon County Bank got credit for the $110 as an interest payment on the primary obligation of $60,-500. (The witness is here testifying in explanation of a tabulation and list of payments delivered to plaintiff which is pleaded, set out and annexed in Plaintiff's reply Exhibit "A"). The securities which The Reno National Bank held included notes given by people who lived in Yerington, Nevada (where Lyon county bank was located). Prior to the failure of the Lyon County Bank, the Lyon County Bank in some cases received collections on some of this collateral and then remitted them to The Reno National Bank. There is a letter dated October 8, 1932 addressed to Lyon County Bank reading:

> "Gentlemen: We have today applied the following amounts as interest upon your notes: The Reno National Bank $106.65; Bank of Nevada Savings and Trust, $110. The above amounts represent payments made by Narciso Montelatici and others."

There is a letter by The Reno National Bank to the Lyon County Bank dated September 8, 1932 as follows:

> "Gentlemen: We have received remittance from Narciso Montelatici to apply on indebtedness as follows: On $8,000, interest to April 20, 1931, $110.65. This amount, in turn, has been applied toward payment of the interest on

(Testimony of W. J. Tobin.)

your note for $58,150.34 dated July 1, [84] 1931. On the Montelatici mortgage, originally for $2000, we have received $109.33 of which $100 has been applied on the principal and $9.33 on the interest to September 1, 1932. This leaves a balance due on the Montelatici mortgage of $1300. We have in turn applied the above amounts on your note of October 13, 1931 as follows:"—— (Witness ceases reading, counsel stating it is sufficient.)

The only Montelatici note in view here is the $8000 note.

(Here the Montelatici note is received in evidence Plaintiff's Exhibit 2 for identification.)

PLAINTIFF'S EXHIBIT 2.

(For identification.)

$8000.00 Yerington, Nevada, June 20, 1930

Fifteen months after date without grace, for value received, we, jointly and severally promise to pay to Lyon County Bank or order in Yerington, Nevada, the sum of Eight Thousand Dollars in U. S. gold coin with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable semi-annually also after judgment.

(PAID Received 12/31/32 Yerington, Nevada.)

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest, for non-

(Testimony of W. J. Tobin.)

payment of this note and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof. In the event of the non-payment of this said note at maturity, or its collection by litigation, we jointly and severally agree to pay all expenses that may be incurred thereby, including attorney's fee, and to that end bind ourselves, heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever we may be situated at the option of the holder.

Signed NARCISO MONTELATICI
CONCETTA MONTELATICI
EUGENE MONTELATICI

Rediscounted with Reno
National Bank
No. 6539

(PAID Lyon County Bank, Yerington, Nevada.)

Name Narciso Montelatici, Concetta Montelatici, and Eugene Montelatici.

Date	Payments Interest	Principal Balance

No. 6539 Date 6/20/30 Amount $8000.00
When due 15 mos. Interest, $ 8%

(Testimony of W. J. Tobin.)

Endorsers or collateral Real and Chattel Mtg. on Hotel Patricia

Approved GFW JIW

Notice sent [85]

(ON BACK)

	Endorsement on Interest		
May 3-32	$106.65	to Aug 20	1930
June 1-32	$106.65	to Oct 20	1930
July 8 1932	$106.65	to Dec 20	1930
Aug 8 1932	$106.65	to Febry 20	1931
Sept 8 1932	$110.65	to Apr 20	1931
Oct 14 1932	$106.64	to June 20	1931

	Endorsement on Interest	Endorsement on Principal		Balance Due on Principal
May 10 1933		$20	P	$7980.00
Apr 20 1934		$150–	A	$7830.
			I	
			D	

1-11-25	640	
	586.67	
	44.44	
	1271.11	

Insurance premium collected by Reno National—Not advised

1773.34 To 3/31/34

(W. J. TOBIN resuming) This exhibit shows $110.65 paid on September 8, 1932, interest to April 20, 1931.

At this time we hold a note or security of Elmer S. Wedertz dated February 27, 1931 in the original amount $7300, with interest at 8% in connection with this transaction.

(Testimony of W. J. Tobin.)

On the basis of the original endorsement the balance unpaid on this is $1150.93 principal and interest is paid to February 22, 1933.

We also have a note of Elmer S. Wedertz and Cora H. Wedertz dated February 21, 1933 in the original amount of $1794 with interest at 8% and according to the original endorsement there is a dollar principal balance due and no interest has been paid.

The original endorsements on the back of the note for $1794 dated February 21, 1933, show a payment October 21, 1936 of $1793 and no endorsement whatever upon the interest. The interest from February 1933 to October 1936 has never been paid. [86] We applied it originally as a principal payment.

We also hold a note of P. M. Yparraguirre dated June 15, 1931, in the original amount of $24,800 with interest at 8%. I have already testified as to the endorsements on that note. I believe that is all the notes of security.

I write a letter to Mr. Wedertz on November 16, 1937. This letter is dated November 16, 1937, addressed to Mr. E. S. Wedertz, Wellington, Nevada (reading) "Dear Sir: This is to inform you the Nevada Livestock Production Credit Association has transmitted to this address, for application on principal of your indebtedness, $1095.00. After application of the above funds, your obligation consists of principal balance $1151.93 and accrued

(Testimony of W. J. Tobin.)

interest to October 21, 1937, $1403.72. Yours very truly'' (end of reading).

On

Cross-Examination.

By Mr. Barry,

attorney for defendant, the witness and defendant testified as follows:

There was a letter from the Nevada Livestock Production Credit Association dated November 15, 1937, addressed to me (reading) ''As promised in our letter of November 10th, we now enclose herewith our check in the sum of $1095 to be applied on the principal indebtedness of Mr. E. S. Wedertz to your trust. Kindly acknowledge receipt to both this association and to Mr. Wedertz, giving us new figures as to the standing of his account, after application of the enclosed payment. Sincerely, Bernard Metcalf, Secretary and Treasurer.'' There is a postscript (reads) ''If for any reason above payment cannot be applied entirely upon the principal indebtedness, please hold up and advise us immediately.''

I made some endorsements on the original Lyon County Bank note. Those that were made after November 1932 were made in my office under my direction. At first I made application of all receipts, to the principal indebtedness. There was no direction [87] from Lyon County Bank at any time as to how the application should be made. I did not

(Testimony of W. J. Tobin.)

make the application with authority of the Comptroller of the Currency (Objected to) I made it as an agent of the Comptroller of the Currency (Objection repeated and court ruled the matter might go in subject to the objection. There was no further ruling and no further opportunity to object or except). To this action Complainant excepts.

I eventually received instructions from the Comptroller of the Currency as to the manner of applying the payments—after I had already made the application. (Defendant's exhibit A offered in evidence. Objected to, the court admitted it "for what it is worth and consider the weight, if any, later." No further ruling and no further opportunity to object or except.) To this action Complainant excepts.

Defendant's Exhibit A, letter dated December 16, 1936 to defendant from Kit Williams, Executive Assistant Counsel, Comptroller of the Currency.

(Testimony of W. J. Tobin.)

DEFENDANT'S EXHIBIT "A"

Treasury Department
Comptroller of the Currency
Washington

December 16, 1936

Mr. Walter J. Tobin, Receiver
The Reno National Bank
Reno, Nevada.

REFER CC-LD

Dear Sir:

This will acknowledge receipt of your letter of December 7, 1936 with enclosures referring to your Asset No. 552 representing a bills payable obligation due the Reno National Bank by the Lyon County Bank, now insolvent. You have enclosed a letter from the attorney representing the Lyon County Mortgage Corporation, liquidating Agent for the Lyon County Bank, taking exception to your position that you are entitled to payment in full of Asset No. 552 including interest up to the date of payment in full. You advise that there is now due your trust on Asset No. 552 the sum of $1.00 representing the principal amount due and $7698.52 representing the amount still due in the way of interest.

It is our understanding that you have applied from the collections made on the pledged assets representing both principal and income

(Testimony of W. J. Tobin.)

collections an amount sufficient to pay the bills [88] payable obligation with the exception of $1.00 due in the principal amount of the obligation and the amount you claim still to be due in the way of interest. It is also our understanding that the amount so applied by you represents not only collections made on the principal amounts due on the pledged assets but also collections made from these pledged assets which consist of income or interest accrued upon the assets after the date of closing of the Lyon County Bank. Under the rule stated in the case of Gamble v. Wimberly, 44 F.(2) 329, you are entitled to retain the pledged assets and apply toward interest due on your claim after suspension of the Lyon County Bank all income earned upon and collected from the pledged assets after the date of closing of the Lyon County Bank. It appears therefore that a portion of the collections made by you and applied toward payment of the principal amount due on the bills payable obligation represented in fact income or interest earned upon the pledged assets after the date of closing of the Lyon County Bank. If this is true, you should have applied toward the interest due on your bills payable obligation the income accrued upon and collected from the pledged assets after the date of closing of the Lyon County Bank. Such an application would have reduced the amount of

(Testimony of W. J. Tobin.)

interest still due on the bills payable obligation and increased the amount of principal still due on this obligation, permitting you to receive on your claim against the Lyon County Bank dividends, under the rule stated by the Supreme Court in the cases of Merrill v. National Bank, 173 U. S. 131; 43 L. Ed. 640 and Aldrich v. Chemical National Bank, 176 U. S. 618; 44 L. Ed. 611 until the payment of dividends from the Lyon County Bank due on your claim and the collections made from the principal amount of the pledged assets would pay in full your claim. You are accordingly instructed to revise the principal and interest amounts still due on your claim against the Lyon County Bank and furnish us with a statement indicating the amount still due in principal and interest on your claim against the Lyon County Bank. You will arrive at the amount still due by following the procedure hereinafter indicated:

1. Indicate the amount of collections from the pledged assets representing income due on these pledged assets and collected from the assets after the date of closing of the Lyon County Bank. This amount will be applied by you toward payment of the interest due on your claim after the date of closing of the Lyon County Bank.

2. Apply toward payment of the principal amount due on your claim all collections

(Testimony of W. J. Tobin.)

made from the pledged assets representing the principal amount due on the pledged assets and actually collected from these assets.

3. In the event the amount of collections made from the income earned upon the pledged assets after suspension is more than sufficient to pay all interest due on your claim against the Lyon County Bank, the amount of such excess will be applied by you toward payment of the principal amount due on your claim against the Lyon County Bank.

We believe that our postion relative to your rights against the Lyon County Bank is sustained by the decision handed down by the Ninth Circuit Court of Appeals on December 7, 1936 in the case of Douglass et al v. Thurston County, copy enclosed. [89] In that opinion the Circuit Court of Appeals held that a secured creditor of an insolvent national bank was not entitled to interest from any source on his claim after the date of closing of a national bank. In the opinion, the court discussed the case of Washington-Alaska Bank v. Dexter Horton Nat'l Bank (C. C. A. 9th), 263 Fed. 304, 306-307. The County Treasurer relied upon that decision as sustaining his right to receive interest upon his secured deposit after the date

(Testimony of W. J. Tobin.)

of closing of the national bank. The Circuit Court of Appeals held with respect to this question "That the case is easily distinguishable from the one at the bar. There the national bank was the plaintiff, seeking to foreclose a lien on collateral given by a state bank. The national bank laws dealing with the question of interest, after insolvency, on deposits held by a national bank, were therefore not involved in that suit."

The Washington-Alaska Bank case above mentioned was decided in 1920. Your attorney should advise us whether or not there have been any changes in the Nevada laws relating to state banks in Nevada which would now support the position of the attorney for the Lyon County Bank Mortgage Corporation that no interest is properly payable on the bills payable obligation held by your trust after the date of closing of the Lyon County Bank. Please advise us fully relative to the opinion of your attorney in this question and also furnish the statement indicating the amount still due in principal and interest on your claim against the Lyon County Bank.

Very truly yours,

s/ KIT WILLIAMS

Executive Assistant Counsel

Comptroller of the Currency.

(Testimony of W. J. Tobin.)

In compliance with that request (contained in letter) I changed the Wedertz application. I have the original (Lyon County Bank) note with the changed applications. (Objected to on the ground that "the letter does not instruct him to make any change in the application of these amounts which were paid." Admitted subject to objection and "we will consider later what they are worth." No further ruling and no further opportunity to object or except.)

(Further objection by Mr. Sanford: "We would at this time object to any introduction of testimony upon the change in application and change by Mr. Tobin, upon the ground that when he made the application and when the bank made the application, that he is bound by the application as made; that he couldn't revise it; that if he notified the parties of these applications he can't change them after the application has been made." [90]

The Court: "For the present, the objection will be overruled. The document may be admitted and evidence given, subject to the objection." (There was no further ruling and no further opportunity to object or except.)

Exhibit B was admitted in evidence.

(Objection was made by plaintiff to the certificate in the exhibit, viz: "This is to certify that this is a true and correct copy of corrected applications under instructions of the Comptroller of the Cur-

(Testimony of W. J. Tobin.)

rency, December 16, 1936. W. J. Tobin, Receiver, The Reno National Bank."

The Court: "I think there might be a serious question whether any certificate will be entitled to weight, but we will determine that later.

Additional reason for objection by Counsel for Plaintiff: "That is his interpretation of those instructions and we submit those instructions don't say that".

(There was no further ruling and no further opportunity to object or except.)

DEFENDANT'S EXHIBIT "B"

$60,500.00 Reno, Nevada, July 1, 1931

On demand after date, without grace, for value received Lyon County Bank a corporation, promises to pay to

The Reno National Bank

or order, at its banking office in Reno, Nevada the sum of Sixty thousand five hundred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for nonpayment of this note, and all defenses on the ground of any extension of time of its payment

(Testimony of W. J. Tobin.)

that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder. [91]

[Seal] In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be affixed by its proper officers first thereunto duly authorized.

LYON COUNTY BANK

GEO F. WILLIS
Secretary

By J. I. WILSON
President

No. 5166.

(Testimony of W. J. Tobin.)

(On Back)

	Endorsement on Principal		Balance due on Principal
Philatro & Jones	2-23-1932	$1000.	$59,500.
Offset	3- 3-1932	$ 956.36	$58,543.64
Sec. Corp coupons	3- 8-1932	$ 180.00	$58,363.64
Montelatici	5- 3-1932	$ 106.65	$58,256.99
do	6- 1-1932	$ 106.65	$58,150.34
Mtg. Sec. Coup	2- 6-1933	$ 180.00	$57,970.34
H. E. Carter	2-23-1933	$3765.56	$54,204.78
E. S. Wedertz	" "	$4919.00	$49,285.78
L. L. Wedertz	2-27-1933	$4080.25	$45,205.53
Montelatici	5-10-33	20.00	45,185.53
Jones	7- 8-33	4481.79	40,703.74

	Endorsement on Interest	
12-16-1931	$2420.00	to 12-31 1931
6-30-1932	$ 180.00	on acct Mtg. Sec. Cp
6-30-1932	$ 660.	" " Walker River Cp.
7- 2-1932	$ 660.	" " "
7- 8-1932	$ 106.65	" " Montelatici
8- 8-1932	$ 106.65	" " "
8-13-1932	$ 110.00	" " Simpson
9- 8-1932	$ 106.65	" " Montelatici
10-14-1932	$ 106.65	" " "
2-23-1933	$ 574.44	" " H. E. Carter
2-23-1933	$ 866.25	" " E. S. Wedertz
2-27-1933	498.00	to 11-5-32 L. L. Wedertz
"	9.77	on acct. do

	Endorsement on Principal		Balance due on Principal
Montelatici	4-20-1934	$ 150.00	$40,553.74
Philatro & Jones	" "	$ 50.00	$40,503.74
Mtg. Sec. Cp.	11-30-34	1499.23	39,004.51
Montelatici	12-24-1934	$5000.00	$34,004.51
Jones	2-19-1935	$4135.78	$29,868.73
"	2-25-35	2.45	29,866.28
"	4-19-1935	$3643.31	$26,222.97
Yparraguirre	5-31-1935	$3976.88	$22,246.09

(Testimony of W. J. Tobin.)

Walker Bonds	6-10-35	14306.16	7,939.93
Yparraguirre	6-17-35	(red) 40.79	7,980.72
Koenig	7- 2-1935	456.74	$ 7,523.98
H. E. Carter	10-24-1935	$2000.00	$ 5,523.98
L. L. Wedertz	1- 4-36	3329.75	2,194.23
Jones Comp.	6-16-36	100.00	2,094.23
Carter Wed.	10-21-1936	$1357.84 on acct	7698.52
			Balance
			9056.36
Carted Wed.	10-21-1936	$1357.84 on acct	7698.52
"	10-29-1937	$ 873.05 "	6825.47

[92]

This is to certify that this is a true and correct copy of original note which I hold.

W. J. TOBIN
Receiver, The Reno National Bank

$60,500.00 Reno, Nevada, July 1, 1931

On demand after date, without grace for value received Lyon County Bank a corporation, promises to pay to The Reno National Bank or order, at its banking office in Reno, Nevada, the sum of Sixty Thousand Five Hundred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureities, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-

(Testimony of W. J. Tobin.)

payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder.

In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

[Seal] LYON COUNTY BANK
By /s/ J. I. WILSON
President

By s/s GEO. F. WILLIS
Secretary

No. 5166

(Testimony of W. J. Tobin.)

(On the back)

Corrected applications under instructions of the Comptroller of the Currency December 16, 1936.

	Endorsement on Principal		Balance Due on Principal
2-16-1932	$ 956.36		$59,543.64
2-23-32	$1000.00		$58,543.64
3- 8-32	$ 180.00		$58,363.64
5- 3-32	$ 106.65		$58,256.99
6- 1-32	$ 106.65		$58,150.34
2-23-33	$3765.56		$54,384.78
2-23-33	$4919.00		$49,465.78
2-27-33	$4080.25		$45,385.53
7- 8-33	$1947.11		$43,438.42
11-30-34	989.23		42,449.19
12-24-34	3403.61		39,045.58
	Endorsement on Interest		
12-16-31	$2420.00	to 12-31 1931	
6-30-32	$ 180.00	on acct	
"	$ 660.	"	
7- 2-32	$ 660.	"	
7- 8-32	$ 106.65	"	
8- 8-32	$ 106.65	"	
8-13-32	$ 110.	"	
9- 8-32	$ 106.65	"	
10-14-32	$ 106.65	"	
2-16-33	$ 180.00	"	
2-23-33	574.44	"	
"	$ 866.25	"	
2-27-33	507.77	"	
5-10-33	20.00	"	
7- 8-33	2534.68	7-8-33	
Balance forward			$39,045.58

	Endorsement on Interest	Balance Due on Principal
2-19-35	$2334.82	$36,710.76
4-19-35	$3490.92	$33,219.84
5-31-35	$1841.01	$31,378.83
6-10-35	$14236.42	$17,142.41

(Testimony of W. J. Tobin.)

7- 2-35	372.94	$16,769.47
10-24-35	$1582.70	$15,186.77
1- 4-36	$3090.16	$12,096.61
10-21-36	$1256.67	$10,839.94
"	1523.00	9,316.94

Endorsement on Interest

4-20-34	$ 150.00	on acct.
4-26-34	$ 50.00	"
11-30-34	$ 510.00	"
12-24-34	$1596.39	"
2-19-35	$1800.96	"
2-25-35	$ 2.45	"
4-19-35	$ 152.39	"
5-31-35	$2095.08	to 5-31-35
6-10-35	$ 69.74	to 6-10-35
7- 2-35	$ 83.80	to 7- 2-35
10-24-35	$ 417.30	to 10-24-35
1- 4-36	239.59	to 1- 4-36
1-16-36	100.00	on account
10-21-36	671.40	to 10-21-36

This is to certify that this is a true and correct copy of corrected applications under instructions of the Comptroller of the Currency Dec. 16, 1936.

W. J. TOBIN,
Receiver, The Reno National Bank

Witness resumes. With that new application there is a principal balance due of $9316.94 and don't show the accrued interest. There is interest due from October 21, 1936 that isn't [94] shown.

I had considerable correspondence with Mr. Blair (Manager of plaintiff corporation) and Mr. Haight, attorney for the Lyon County Bank, reconstructed, or whatever you call it (Lyon County Bank Mortgage Corporation) discussing the matter and the

(Testimony of W. J. Tobin.)

application of the money and how much was due. That discussion started in 1935.

On

Redirect Examination

By Mr. Sanford

witness Tobin testified:

I revised the endorsements and the allocation of the amounts paid upon the original note. As to the subordinate notes or underlying security—the amounts which had been paid on the underlying securities—on the collateral I had left—I made the same reversed the entries. I made the change in the endorsements in these notes I have here—the Yparraguire note and the original Elmer S. Wedertz note. On this other one, where the payment of $1793 was received, that was made by the Nevada Livestock Production Credit Association with definite instructions to apply it on the principal. It was made that way, so I didn't reverse that. As to the Wedertz note the revision on the principal security contemplated a revision of the allocation on the Wedertz note, but as a matter of fact I did not make the change upon that underlying security. I did not do so pending the outcome of this suit but if it is to be made that way I will have to return that money to the people that advanced it to Wedertz with instructions. If I can't follow their instructions I will undoubtedly have to eliminate the endorsement entirely. I have not notified the Nevada Livestock Production Credit Association of this

(Testimony of W. J. Tobin.)

situation yet, but I have accepted the payment. I notified the Wedertz' prior to the alteration how I had made the credits—advising them that I had made the credits on the principal. Since that time I have not advised them that [95] I changed the credits from principal to dividend between principal and interest.

As to the notes which had been returned to the makers, I didn't receive instructions from the Comptroller until December 16, 1936, and with few exceptions all the notes had been returned to the debtors prior to that time. I did not have to make revisions on the underlying securities, even though they had been returned,—in order to revise the allocations on the primary note. I didn't make any notations because I didn't have them (the papers) but I did do it as something mentally even though I didn't hold the securities at the time and they had passed out of my control.

When these amounts were credited upon the principal of the underlying notes the interest ceased upon those notes to the extent of the amount paid.

In the original application I applied a good deal to interest. I should correct my statement that I applied them all to principal. There were some interest payments made in 1933 that is, endorsed by me (answering questions by Mr. Haight of counsel for Plaintiff).

In order to make the revised applications which I made recently, it was necessary to change the application of the Carter sub-collateral. Under the

(Testimony of W. J. Tobin.)

revised application the last item H. E. Carter (referring to the prepared statement, Plaintiff's Exhibit A in Reply) was $1625.99 interest due. The balance owing by Carter in order to make the same changes on the sub-collateral as I made on the main obligation, would make H. E. Carter owe $1625.99 as of October 21, 1936. When I made the final settlement with Carter I returned the note to him. I accepted from Mr. Carter in full settlement of his obligation $873.05. Under the revised set-up this amount, in order to make our balance $9316.94, would be $1625.99. [96]

I wrote the letter to Mr. and Mrs. H. E. Carter October 22, 1936. (Letter offered and received in evidence, Plaintiff's Exhibit 3.)

PLAINTIFF'S EXHIBIT No. 3

Oct. 22, 1936.

H. E. and Roena Carter
Wellington, Nevada

Dear Sir and Madam:

Re: Lyon County Bank Note.

This is to advise that I have received from the Nevada Livestock Production Credit Association $1523.00 for application on your indebtedness to this trust.

These funds have been applied as follows:

$1520.44 on your note dated February 21, 1933 to W. J. Tobin, Receiver, leaving a remaining principal balance due thereon of $1.00; interest on account of this note $2.56.

(Testimony of W. J. Tobin.)

After giving effect to these applications your indebtedness to this trust is as follows:

Note #6795 originally to Lyon County Bank Principal balance	$ 1.00
Accrued interest to Oct. 24, 1935	370.31
Note dated February 21, 1933 to W. J. Tobin, Receiver	
Principal balance	1.00
Accrued interest to Oct. 21, 1936	500.74
Total	$873.05

Yours very truly,

WEB:GR W. J. TOBIN,
Receiver.

c.c. Lyon County Bank

E. W. BLAIR,

a witness called on behalf of the plaintiff, was sworn and testified as follows:

I am connected with Lyon County Bank Mortgage Corporation, the plaintiff in this case. The plaintiff has part if not all of the files and records of Lyon County Bank. As to the Montelatici note of June 20, 1930, Exhibit for Identification No. 2, I have seen this copy April 1, 1934 in the possession of the Lyon County Bank when I took charge of the Mortgage corporation. I imagine the original note was returned to Montelatici [97] after the matter was cleaned up in our files. The copy

(Testimony of E. W. Blair.)

was retained in the files of Lyon County Bank for the purpose of being informed at all times as to what paper was out. Montelatici was and is a resident of Yerington. The papers were made at the Lyon County Bank and then transmitted to The Reno National Bank. The endorsements of interest on this Exhibit 2 for identification are in the handwriting of George F. Willis, formerly cashier of the Lyon County Bank and after the suspension he was acting under Mr. Seaborn (State Bank Examiner) prior to the formation of the mortgage corporation.

The endorsements show the amounts, date of payment and date paid to the period of time that the interest covered. Later and lower down it shows the endorsements on the principal. One endorsement in the handwriting of Mr. Willis and one endorsement in my own handwriting.

(Plaintiff's Exhibit 2 offered and admitted in evidence—being the same as plaintiff's Exhibit 2 for identification.)

WALTER BUTLER,

a witness called by the defendant, was sworn and testified as follows:

I am employed, since the summer of 1935, as clerk and bookkeeper, by the receiver of The Reno National Bank. I am familiar with the records in this case—that is the payments on the obligation of the

(Testimony of Walter Butler.)

Lyon County Bank to The Reno National Bank. The note itself shows there was $58,150.34 principal due at the time Mr. Tobin took possession of the assets of The Reno National Bank. The interest was paid in full to December 31, 1931, and there had been received several amounts on account of interest due subsequent to that date. There were certain collateral securities pledged. The interest on these that accrued and was collected after December 12, 1932 (when Mr. Tobin went in) down to October 21, 1936, totals $14,658.84.—No—that wasn't interest on collateral securities. On collateral securities it [98] was $23,118.97. That is the total amount he collected on collateral securities.

After all the payments had been made up to the 21st day of October, 1936, and applying the $14,658.84 to the payment of interest, and applying the $956.36 deposit of the Lyon County Bank (a deposit balance on open account), the amount that would have been due on the 21st of October, 1936 on the principal obligation is $9316.94.

Two payments were made since—one of them held in the trustee account—the other has been endorsed on the original Lyon County Bank note. These are the two payments Mr. Tobin referred to.

(Testimony of Walter Butler.)

(On

Cross Examination

By Mr. Sanford

for the Plaintiff)

That figure of $14,658.84 as amount of interest accrued and collected from December 12, 1932 down to and including October 21, 1936,—isn't correct. It is, under our revised set-up. That is what we want to do now. The tabulation goes back to February, 1932. (The witness here consults and speaks of a sheet of tabulation which he holds being the same as exhibit "A" in Plaintiff's Reply.)

During that period I applied on the interest the sum of $5342.90, speaking of the primary obligation, and that includes payments prior to the suspension of The Reno National Bank and clear back to the inception of this loan.

I never made a compilation, split as to the date February 16, 1932 (date of suspension of Lyon County Bank) as to the interest actually accruing on this underlying security after the Lyon County Bank closed February 16, 1932,—or as to interest which accrued after that date and was collected after that date by Mr. Tobin.

I can tell you what was collected and applied according to the original application. [99]

The amount $23,118.97 I testified to in reply to Mr. Barry (Attorney for Defendant) as being the total amount collected, is the total amount under

(Testimony of Walter Butler.)
the so-called revision. And the $14,658 was also based on the so-called revision. And the $9316.94 balance was based on the so-called revision.

(Responding to question by the Court) On the original manner in which the amounts were applied there is a balance due on the Lyon County Bank note, of one dollar principal and $6825.47 interest,—and on the revised application there is due $9318.94 and interest from October 21, 1936.

Thereafter the presentation of evidence proceeded no farther.

Thereafter both sides rested and by order counsel were requested to supply briefs to the court and the complainant filed and served an opening brief, the defendant filed and served an answering brief and the complainant filed and served a reply brief.

In the reply brief the complainant submitted the following points and requests in the conclusion of its brief:

> "1. That the Nevada Banking Act of 1911 is paramount and exclusive on the question of allowing or paying any interest on a claim against a closed and insolvent state bank. Counsel has cited no authority in denial of this point and we confidently say he can not.
>
> "That in applying to a claim as for interest the words 'lien or charge for any payment, advance or clearance thereafter made, or liability

thereafter incurred against any of the assets of the bank' in section 35 of the act (N. C. L. 1929, Sec. 684) clearly refer to a claim or charge as for any interest computed on an obligation from and after February 16, 1932, and they bar and forbid such a claim or any lien or charge therefor. Counsel has reasoned on this matter but the authorities he offers are not in point and they are nullified by the positive authorities cited herein.

"3. That the law not only makes the contract between the lender and the borrower bank, imposing the statutory restrictions upon it, but the contract on which the defendant stands otherwise, must be read in the light of the wording of the collateral [100] security agreements that are exhibits in this case. These are the printed agreements submitted by The Reno National Bank for execution. They are the creditor's own documents and the creditor is bound strictly by them and cannot enlarge the obligation therein defined.

"4. That the accounting by defendant as to the administration of the pledge, the credits applied on collateral paper and the consequent application of collections or avails, to the primary obligation of Lyon County Bank, does not conform to the historical facts; that it is not a faithful accounting; that it represents unnecessary detriment to the Lyon County Bank, pledgor not permitted by the contract, justified

by fair dealing or acquiesced in or ratified by the debtor bank.

"5. That the so-called revision or reapplication of credits is contrary to law, injurious to the debtor bank and not to be tolerated after the fact. 'As the tree falleth, so let it lie.'

"6. That the defendant ought to be ordered to account to the plaintiff for the overplus it has received and retained and to surrender the securities not yet liquidated and make due amends for any collateral which it has impaired or placed beyond the power of the plaintiff to liquidate.

"7. That the plaintiff ought to have judgment as prayed for, including the delivery of all sums realized during the pendency of this action and voluntarily impounded as it were, and the surrender of all remaining securities and the restoration of any securities cancelled or impaired or equitable accounting for the same, if *if* be found they cannot be restored.

"A. L. HAIGHT
"GEORGE L. SANFORD
"Attorneys for Plaintiff."

Thereafter without further notice and without notice to the complainant first given the court did on the 16th day of June, 1938 make, sign, enter and cause to be entered and filed, its decision and judgment in the words and figures as follows, to- wit:

[Title of District Court and Cause.]

"OPINION AND DECISION

"Norcross, District Judge:

"The Lyon County Bank, in pursuance of the laws of the States of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank. On December 12, 1932, the Reno National Bank was [101] adjudged to be insolvent by the Comptroller of the Currency and W. J. Tobin was appointed and qualified as Receiver thereof. In pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the State banking laws, the State Banking Examiner transferred all property of the said Lyon County Bank to Lyon County Bank Mortgage Corporation, Complainant herein.

"On July 1, 1931, said Lyon County Bank negotiated a loan from said Reno National Bank in the sum of $60,500.00 and executed a formal note therefor payable 'on demand * * * with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.' The Lyon County Bank also delivered to the Reno National Bank, pledged as collateral security, certain bonds and notes of a total face value in excess of the amount of the loan. At the time the Lyon County Bank was taken over by the State Bank Examiner, it had a deposit

account with the Reno National in the sum of $956.36, which was later credited upon the note. Defendant's answer alleges that at the time the Reno National Bank was taken over by the receiver there was due as principal on said note the sum of $59,543.64. By its answer, Defendant admits the collection of $14,658.84, in the form of interest paid on pledged securities, and the application of such amount to the discharge of claimed accrued interest on the note of the Lyon County Bank. Complainant claims a balance due on principal of said note in the sum of $9,316.94, together with interest thereon from October 21, 1936. Complainant alleges the total amount due upon principal and interest at the date the Lyon County Bank was taken over by the State Bank Examiner was $60,-148.64; total payments received by Defendant in the sum of $65,841.90, and, hence, Defendant is indebted to Complainant in the sum of $4,736.90. Complainant prays judgment in this amount and for return of certain pledged securities and for general relief.

"Questions of law presented upon the facts of this case are whether the amount of indebtedness of the Lyon County Bank to the Reno National Bank is finally determined as the date of insolvency of the Lyon County Bank and its taking over by the State Bank Examiner and thereafter no interest would accrue thereon, which is the contention of Complainant, or whether where such indebtedness is secured

by interest bearing pledges, interest derived therefrom may be applied in discharge of interest which does accrue thereon, which is the contention of Defendant.

"Upon the trial it appeared from exhibits introduced that Defendant had credited payments received upon collateral whether as principal or interest mainly upon the principal of the note and as so indorsed thereon the balance on the principal of [102] the note as of October 21, 1936, was but one ($1.00) dollar and a balance due on interest as of that date in the sum of $7,698.52. Following receipt of a letter of date December 16, 1936, from the Executive Assistant Counsel of the Comptroller of the Currency, advising Defendant that—'Under the rule stated in the case of Gamble v. Wimberly, 44 F.(2d) 329, you are entitled to retain the pledged assets and apply toward interest due on your claim after suspension of the Lyon County Bank all income earned upon and collected from the pledged assets after the date of closing of the Lyon County Bank.'—the Defendant made a revision of said previous indorsements resulting in a balance due on principal as of October 21, 1936, of $9,316.94.

"The securities pledged by the Lyon County Bank consisted of six $1,000.00, First Lien Coupon Certificates of the Mortgage Security Corporation of America, of January 1, 1941 maturity; Twenty-two $1,000.00, Walker River Irrigation District First Issue, Series 1, 6%

Bonds, maturity January 1, 1940; Six promissory notes, secured by Mortgages, executed during the years 1930 and 1931, in the total principal amounts of $67,100.00.

"It is Complainants contention that the Lyon County Bank was not liable for interest upon its said note to the Reno National Bank after the date of its insolvency. Complainant relies on the provisions of sections 35 and 53 of the State Bank Act approved March 22, 1911, Nevada Compiled Laws 1929, Vol. I, section 650 et seq. Section 35 as amended March 2, 1931 reads:

> " 'No bank official shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security or otherwise; provided, however, that any bank may secure funds deposited with such bank by the United States, state, or counties of the state by pledging acceptable assets of the bank as collateral security; provided further, that any bank may borrow money for temporary purposes, not to exceed the amount of its paid-up capital, and may pledge any of its assets as collateral security therefor; provided further, that when it shall appear that a bank is borrowing habitually for the purpose of conducting its business, the bank examiner may require such bank to pay off such borrowed money. Nothing herein shall prevent any bank from rediscounting in good faith and indorsing any of its negotiable notes.'

"By section 53 it is provided:

> "'Whenever it shall appear * * * from any examination or report provided for in this act the examiner shall have reason to conclude that such bank is in an unsafe or unsound condition to transact the business of a bank, or that it [103] is unsafe and inexpedient for such bank to continue in business, the examiner may forthwith take possession of the property and business of such bank and retain such possession until such bank shall resume business or its affairs be finally liquidated as herein provided. No bank, corporation, firm or individual knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid * * *.'

"It is clear from the reading of section 35 that the Lyon County Bank was authorized to negotiate the loan in question and to 'pledge any of its assets as collateral security therefor'. There is nothing in the provisions of section 53, supra, that would affect pledged assets to secure the payment of a note issued in pursuance of the provisions of said section 35. It has been contended that interest accruing upon the note after the insolvency of the Lyon County Bank was a liability 'thereafter incurred within the

meaning of said section 53.' This contention is without merit as will hereafter appear.

"The State Banking Act of March 24, 1909 made the following provision:

> " 'Sec. 48. The claims of depositors, for deposits, and claims of holders of exchange shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, which at the time of closing of the bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership; upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. * * *.' See Washington-Alaska Bank v. Dexter Horton Nat. Bank, 263 F. 304, 310.

"The case last cited involved the question whether the Washington-Alaska Bank was subject to the banking laws of the State of Nevada, said bank having been organized under the laws of the State of Nevada. The Circuit Court of Appeals of this Circuit held that the banking laws of Nevada were not applicable as the bank was doing business in the Territory of Alaska. So holding, the Court decided the question here presented in favor of the Dexter Horton National Bank as follows:

> " 'A pledge which secures an interest-bearing debt secures the interest as much as the principal of the debt.' (Citing authorities p. 306).

"Commenting on the case last cited the Circuit Court of Appeals for this Ninth Circuit in Douglass [104] v. Thurston County, 86 F.(2d) 899, 910, said:

> " 'In support of his contention in favor of the allowance of interest after the bank's insolvency, the treasurer relies upon a single decision—that of Washington-Alaska Bank v. Dexter Horton Nat. Bank (C. C. A. 9) 263 F. 304, 306, 307. That case is easily distinguishable from the one at bar. There the national bank was the plaintiff, seeking to foreclose a lien on collateral given by a state bank. The national bank laws dealing with the question of interest, after insolvency, on deposits held by a national bank, were therefore not involved in that suit.'

"In the case of Gamble v. Wimberly, 44 F. (2d) 329 the Circuit Court of Appeals for the Fourth Circuit, quoting from syllabus, held:

> " 'Secured creditor of national bank in liquidating claims can retain interest and dividends accruing on collateral since date of debtor bank's insolvency (12 U. S. C. A. 194).'

"The contention of Defendant respecting the claimed right to subject the pledged securities to the payment of interest accrued subsequent to the insolvency of the Lyon County Bank also finds support in the following authorities: Ticonic National Bank v. Sprague, 303 U. S. .....;

Organ v. Winnemucca State Bank, 55 Nevada 72, 26 P.(2d) 237; 9 C. J. S. 389, 513, 537.

"Judgment for Defendant.

"Dated this 16th day of June, 1938.

"FRANK H. NORCROSS,
"District Judge."

Thereafter on or about the 2nd day of August, 1938 the defendant filed and served and lodged in said action his proposed findings of fact and conclusions of law and proposed judgment which are in the words and figures following, to-wit:

[Title of District Court and Cause.]

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"This matter came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant. [105]

"From the evidence introduced, the Court finds the facts as follows, to-wit:

"I

"That Lyon County Bank, in pursuance of the laws of the State of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank; that on December 12, 1932, The Reno National Bank was adjudged to be insolvent by the Comptroller of

the Currency, and W. J. Tobin was appointed and qualified as Receiver thereof; that in pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the state banking laws, the State Banking Examiner transferred all property of said Lyon County Bank to Lyon County Bank Mortgage Corporation, complainant herein.

"II

"That among the assets of The Reno National Bank, when defendant took possession thereof as Receiver, there was a note of the Lyon County Bank upon which there was then due as principal the sum of $59,543.64.

"III

"That to secure the payment of said note, said Lyon County Bank had hypothecated to The Reno National Bank certain securities consisting of bonds, and notes secured by mortgage, as security for the payment of said principal obligation.

"IV

"That payments aggregating the sum of $65,841.90 were received by the defendant and The Reno National Bank since February 16, 1932 on account of the indebtedness upon which a claim had been filed by defendant, and that of said sum, the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank.

"V

"That after applying said sum of $14,658.84 to the payment of interest due on said primary obligation of the Lyon County Bank to The Reno National Bank up to the 21st day of October, 1936, and the balance remaining after the application of the interest, as aforesaid, on said primary obligation, and after the application of the balance of said sum of $65,841.90 remaining after deducting the said sum of $14,658.84 on said principal obligation, as aforesaid, together with the sum of $956.36, which consisted of a balance due to the credit of the Lyon County Bank in The Reno National Bank, said indebtedness was reduced to the sum of $9,316.94 on the 21st [106] day of October, 1936.

"VI

"That in addition to the sums above mentioned, the defendant, on October 29, 1937, collected on the pledged security of H. E. Carter the sum of $1,625.99, and on October 15, 1937, collected on the pledged security of E. S. Wedertz the sum of $1,095, leaving a balance of $6,595.95 owing from plaintiff to defendant; that the interest on the sum of $9,316.94 from the 21st day of October, 1936 to the 18th day of March, 1938, less deduction of interest on said payments, is the sum of $838.18, which said sum is now due, owing, unpaid and payable from the plaintiff to the defendant.

"VII

"That no evidence was introduced as to the allegations set forth in what is termed by plaintiff; 'And for a Defense to said Purported Defense, Counter-Claim and New Matter', and that therefore there was no evidence upon which to base a finding as to said allegations.

"As Conclusions of Law from the foregoing facts, the Court finds:

"That plaintiff is indebted to the defendant in the sum of $7,434.13, and that defendant have judgment against the plaintiff in the said sum of $7,434.13, together with interest at the rate of 8% per annum from the 18th day of March, 1938, and for costs of suit; and

"It is ordered that judgment be entered herein in accordance herewith.

"Dated:

.....,

District Judge."

[Title of District Court and Cause.]

"JUDGMENT.

"This cause came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford and A. L. Haight appearing as attorneys for the plaintiff, and N. J. Barry appearing as attorney for the defendant.

"Whereupon, witnesses on the part of plaintiff and defendant were duly sworn and ex-

amined, and documentary evidence introduced by the respective parties. The evidence being closed, the cause was submitted to the Court for consideration and decision, and after due [107] deliberation thereon, the Court filed its Findings and Decision in writing and ordered that judgment be entered herein in favor of the defendant in accordance therewith.

"Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, defendant, do have and recover of and from Lyon County Bank Mortgage Corporation, a corporation, plaintiff, the sum of $7,434.13, with interest thereon at the rate of 8% per annum from the 18th day of March, 1938, together with defendant's costs and disbursements incurred in this action amounting to the sum of $58.44.

Dated:

.....,

"Judge of the United States District Court for the District of Nevada."

Thereafter on or about the 11th day of August, 1938 the complainant filed and served its Objection to Proposed Findings of Fact and Conclusions of Law and Judgment and Complainant's Proposed Findings and Judgment, in the words and figures as follows, to-wit:

[Title of District Court and Cause.]

"Complainant's Objection to Proposed Findings and Judgment and Complainant's proposed Findings and Judgment.

"Comes now the complainant, Lyon County Bank Mortgage Corporation, and objects and excepts to the defendant's proposed findings of fact and conclusions of law and to the proposed formal judgment, heretofore served and filed herein, for the reasons and on the grounds following, to-wit:

"I

"Objects to the recital lines 22 and 23, page 1: 'From the evidence introduced the court finds the facts as follows, to-wit' and requests that it may be made to read 'From the evidence introduced and in consideration of the pleadings and admissions by failing to plead or deny, or otherwise, the court finds the facts as follows:'

"II

"Objects to findings of fact II on the ground that the same is not warranted by the evidence and [108] is contrary to the evidence.

"III

"Objects to the last part of finding of fact IV, to-wit: 'and that of said sum the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank' on the ground that the same is not warranted by the evidence and is contrary to the evidence.

"IV

"Objects to finding of fact V on the ground that the same is not warranted by the evidence and is contrary to the evidence.

"V

"Objects to finding of fact VI on the ground that the same is not warranted by the evidence and is contrary to the evidence.

"VI

"Objects to finding of fact VII on the ground that the reply of complainant sets up facts constituting a defense and plea of estoppel and alleges matters with respect to the allegations of the counterclaim in the defendant's answer. That substantial evidence was introduced in support thereof by the complainant as set forth in complainant's requested findings.

"VII

"Objects to the proposed conclusions of law on the ground that they are not made from any valid findings of fact and are not based on fact or law.

"VIII

"Objects to the proposed formal judgment on the ground that it is not based on any valid findings of fact or conclusions of law and that it is against the facts and against the law.

"Complainant herewith files the annexed proposed findings of fact and conclusions of law and proposed judgment and requests the court

to approve, adopt, sign, file, and cause to be entered and filed, the same, but after hearing, however, and requests that these matters may be heard and determined by the court after ten days' notice to the defendant by mail by mailing a copy of these objections and proposed findings and judgment together with a copy of the order setting a day for hearing thereon, to the defendant's attorney, Norman Barry, Esq., Reno, Nevada, and complainant requests that after hearing the court may reject the findings objected to and the judgment objected to and may adopt, sign, and [109] enter the findings and judgment proposed, in lieu thereof.

"Dated the 10th day of August, 1938.

"A. L. HAIGHT and
"GEORGE L. SANFORD,
"Attorneys for Complainant."

[Title of District Court and Cause.]

"COMPLAINANT'S PROPOSED FINDINGS AND PROPOSED JUDGMENT.

"This matter came on regularly for trial on the 18th day of March, 1938, before the court, without a jury, a jury trial having been duly waived by the parties; George L. Sanford, Esq., and A. L. Haight, Esq., appearing as attorneys for the complainant, and N. J. Barry, Esq., appearing as attorney for the defendant.

"From the evidence introduced and in consideration of the pleadings and admissions by

failing to plead, reply, deny or otherwise, the court finds the facts as follows:

"I

"That Lyon County Bank, in pursuance of the laws of the State of Nevada relating to banks, on February 16, 1932, was taken over by the State Bank Examiner as an insolvent bank; that on December 12, 1932, The Reno National Bank was adjudged to be insolvent by the Comptroller of the Currency, and W. J. Tobin was appointed and qualified as Receiver thereof; that in pursuance of judgment and decree of the State District Court entered October 26, 1933, in accord with the state banking laws, the State Banking Examiner transferred all property of said Lyon County Bank to Lyon County Bank Mortgage Corporation, complainant herein.

"II

"That on February 16th, 1932, when the said Lyon County Bank was declared insolvent and was taken over by the state bank examiner, The Reno National Bank held and owned a demand note of Lyon County Bank dated July 1, 1931, for $60,500., with interest at 8% per annum; interest paid to January 1, 1932. That on said February 16th, 1932, the said Lyon County Bank had on deposit with said The Reno National Bank the sum of $956.36; that on February 16, 1932, there was due and unpaid upon said note the sum of $60,500. principal and $605. interest, making a total of $61,105; that the said

The Reno National Bank offset the said $956.36 against the said principal obligation, leaving a balance of $59,543.64 principal, and unpaid interest on said note from January 1st, 1932; That between February 16, 1932, [110] and June 2, 1932, The Reno National Bank applied upon the said note from avails collected of securities held by it the further sum of $1393.30; applying the same upon the principal of the note; that on September 1, 1932, The Reno National Bank filed a claim against the insolvent, Lyon County Bank, for the sum of $58,150.34 principal on note, together with interest.

"III

"The Lyon County Bank on July 22, 1931, hypothecated to The Reno National Bank certain securities consisting of bonds, and notes secured by mortgages as security for the payment of all the indebtedness of Lyon County Bank to The Reno National Bank existing on the last-mentioned date, as well as all the future indebtedness to the said The Reno National Bank which the Lyon County Bank might thereafter incur. It was then and there agreed and contemplated by and between the parties that said security would be for the payment of whatever of principal or interest was then and there due, and also for the payment of whatever obligations by way of interest or otherwise that should be incurred after July 22, 1931. It was then and there agreed and understood in said agreements that any interest computed for any

period after July 22, 1931, would be considered a liability of Lyon County Bank incurred in such period. That at the time said promissory note of $60,500. was given and at the time said collateral security agreements were made the Nevada Banking Act of 1911 and Sections 35, 53, and 72 thereof, and all of said act was in full force and effect.

"That no indebtedness to The Reno National Bank was incurred and owing by the Lyon County Bank after July 22, 1931, from that time until February 16, 1932 (other than the principal sum in said promissory note amounting to $60,500.) except interest on said principal sum computed from January 1, 1932, to February 16, 1932, amounting to $605.

"IV

"Payments aggregating $65,841.90 were received by The Reno National Bank and the defendants as avails and proceeds from the said collaterals and securities, including a collection of $956.36 of a credit balance of Lyon County Bank standing on open account and including other sums, in the period from February 16, 1932, to and including October 21, 1936. Said collections were in excess of the claim of The Reno National Bank and the excess was $4736.90. Said collections of $5182.92 included $2142.17 collected prior to February 16, 1932, and $110. of said reported collections was not a collection of any interest [111] or avails or proceeds from collaterals. Interest accrued and was

collected and retained by the said bank and defendant, being avails and proceeds from the said collaterals and securities covering the period from February 16, 1932, to and including October 21, 1936, in the total amount of $2930.75 as follows, to-wit:

"June 30, 1932,	Mortgage Security Corporation bond coupons,	$ 134.00
July 2nd, 1932,	Walker River Irrigation District bond coupons,	498.67
Feb. 6, 1933,	Mortgage Security Corporation bond coupon,	180.00
Feb. 23, 1933,	H. E. Carter, interest on loan,	446.11
Feb. 23, 1933,	E. S. Wedertz, " " "	640.75
Feb. 27, 1933,	L. L. Wedertz, " " "	406.66
Jan. 1, 1936,	L. L. Wedertz, " " "	622.00
Oct. 21, 1936,	H. E. Carter, " " "	2.56
		$2,930.75

"V.

"That The Reno National Bank and the defendant collected $65,841.90 in the period February 16, 1932, to October 21, 1936. The claim of The Reno National Bank on February 16, 1932, the date of insolvency and taking over by the state bank examiner, was $60,148.64 and never increased thereafter. The Reno National Bank and the defendant collected and retains $4736.90 more than the amount of its claim against the Lyon County Bank or its insolvent estate or complainant and also withholds certain securities and collaterals.

"VI.

"That on October 21, 1936, The Reno National Bank and the defendant retained the said excess of $4736.90 and did not surrender the following collaterals delivered to it, to-wit:

"Notes of H. E. and Rowena Carter for $5500., dated May 1, 1931, and for $1788. dated February 21, 1933, representing a balance due Lyon County Bank and complainant of $873.05;

"Notes of Elmer H. and Cora Wedertz for $7300., dated February 27, 1931, and for $1794., dated February 21, 1933, representing a balance due Lyon County Bank and complainant of $3471.05 and in addition interest of 8% on $2245.93 thereof after October 21, 1936, to November 15, 1937, and upon $1150.93 from and after November 15, 1937, all at the rate of 8% per annum.

"On October 29, 1937, defendant collected from H. E. Carter $873.05, purporting to be the balance on the Carter notes of $5500. and $1788. This sum has been held by defendant since October 29, 1937, and is due to complainant.

"On November 15, 1937, after suit began the de- [112] fendant collected $1095. on the Elmer S. Wedertz obligations and has retained and holds the same and the same is due to complainant.

"The defendant has returned and surrendered the H. E. Carter notes to the original obligors and the complainant is prevented from recover-

ing more than the said sum of $873.05, although defendant now claims that more is due thereon.

"VII.

"The defendant is indebted and accountable to the complainant in the following sums:

"1. In the sum of $4736.90.

"2. In the sum of $1095.00 on the Wedertz collections and amounts due on such collaterals; also the Wedertz notes amounting to $2296.90 or thereabouts, plus accrued interest from October 21, 1936.

"3. In the sum of $873.05 on the Carter collection.

"That all sums are due and accountable as of October 21, 1936, and as they accrued and were collected and retained.

"VIII.

"That the defendant in the year 1937, stated the account in writing to the complainant as shown by Exhibit A annexed to complainant's reply and it appears therefrom and from the evidence and the court finds that The Reno National Bank and the defendant collected moneys which were avails and proceeds from the said collaterals and endorsed and recorded a record of the same on the said collateral paper and on the promissory note paper of Lyon County Bank. Thereafter the defendant changed or purported to change the said endorsement and record on the said collateral paper and on the

promissory note paper of the Lyon County Bank, without the consent of the said original obligors of the Lyon County Bank or complainant. That the Lyon County Bank upon insolvency February 16, 1932, was unable to pay its creditors and depositors in full and was unable to pay its creditors and depositors in full out of its assets, and has not been able to do so thereafter out of any assets, recoveries or earnings, or at all. That said change in the endorsements and records of collections made by the defendant as above recited was and is a detriment to Lyon County Bank and complainant and deprived said bank and complainant of sums and paper on which it might have realized after discharging all its existing obligations to The Reno National Bank.

"As conclusions of law from the foregoing facts the Court finds:

"The defendant, as receiver of The Reno National [113] Bank is indebted to the complainant in the following sums: $4736.90; $1095; $873.05; $2246.90, or the total sum of $6704.95 and should surrender the said Wedertz notes to the complainant.

"That in the event the said Wedertz notes are not surrendered or cannot be surrendered the defendant is indebted to the complainant and should be required to pay the said sum of $6704.95 and interest on $2245.93 from October 21, 1936, to November 15, 1937, and interest on $1150.93 from November 15, 1937, to date of

trial, to-wit, March 18, 1938, and until paid, all at the rate of 8% per annum.

"Ordered that judgment be entered herein in accordance herewith.

"Dated ....., 1938.

"....

"District Judge."

[Title of District Court and Cause.]

"JUDGMENT

"This cause came on regularly for trial on the 18th day of March, 1938, before the Court without a jury, a jury trial having been duly waived by the parties; George L. Sanford, Esq., and A. L. Haight, Esq., appearing as attorneys for the plaintiff, and N. J. Barry, Esq., appearing as attorney for the defendant.

"Whereupon, witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties. The evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court filed its Findings and Decision in writing and ordered that judgment be entered herein in favor of the complainant in accordance therewith.

"Wherefore, by reason of the law and the findings aforesaid

"It is ordered, adjudged and decreed that Lyon County Bank Mortgage Corporation, a

corporation, complainant, do have and recover of and from W. J. Tobin as receiver of The Reno National Bank of Reno, Nevada, a national banking association, defendant, the judgment of this court as follows, to-wit:

"For the sum of $6704.95 and interest on the same from October 21, 1936, at 8% per annum, and for the return of the notes of E. S. and Cora Wedertz, dated February 27, 1931, in the sum of [114] $7300. and dated February 21, 1933, in the sum of $1794.

"In the event said notes cannot be returned or surrendered by the defendant to the complainant then said judgment shall be and is hereby awarded to the complainant against the defendant in the said sum of $6704.96 and interest as aforesaid, and the further sum being the interest on $2245.93 from October 21, 1936, to November 15, 1937, and the interest on $1150.93 from November 15, 1937, to March 18, 1938, and said interest shall continue until paid, all at the rate of 8% per annum.

"That the complainant have judgment for the further sum of its costs and disbursements incurred in this action amounting to the sum of $.....

"Dated ....., 1938.

.....

"Judge of the United States District Court for the District of Nevada."

On August 10, 1938, the Court signed the findings proposed by the defendant and signed and entered the judgment proposed by the defendant and the same were filed and entered by the clerk.

Thereafter such proceedings were duly and regularly had that on the 2nd day of September, 1938, the above-entitled court entered an order and minute order in the words and figures following, to-wit:

> "Ordered that the findings of fact and conclusions of law and judgment made and entered on the 10th day of August, 1938, be, and the same hereby are, set aside as having been inadvertently made and entered, and it is further ordered that defendant's proposed findings of fact, conclusions of law and form of judgment, lodged with the Court on August 2, 1938, and plaintiff's objections to defendant's proposed findings and judgment and plaintiff's proposed findings and judgment, filed August 11th, 1938, stand as submitted to the Court for consideration and decision."

Thereafter such proceedings were duly and regularly had that on the 8th day of September, 1938, the court entered an [115] order confirming the aforesaid order made and entered September 2, 1938 and signed and filed findings of fact and conclusions of law and entered and caused to be entered judgment in said action and granted an exception to any changes with respect to the findings of fact proposed by plaintiff or any failure to include such

proposed findings and also an exception to the denial by the court of a request by plaintiff for the entry of judgment in favor of plaintiff.

The said findings of fact and conclusions of law and judgment signed, filed and entered and caused to be entered by the court are in the words and figures following, to-wit:

(The same are not copied herein but are a part of the judgment roll and record and are referred to herein.)

Thereafter as of September 8, 1938 the complainant filed and on September 14, 1938 served its objections, which were filed September 14, 1938, which objections are in the words and figures following, to-wit:

[Title of District Court and Cause.]

"COMPLAINANT'S OBJECTIONS

"Comes now the complainant above-named and presents in writing its objections made to the court before the entry of formal judgment in this action and objects as follows:

"I.

"Objects to the Court's finding of fact V in the last three lines thereof, to-wit:

"'* * * and that of said sum, the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank.'

on the ground that the same is not supported by any substantial evidence but is contrary to the evidence and the evidence shows and finding of fact IV finds that the sum of only $2930.75 was interest-avails of said collaterals in said period. [116]

"II.

"Objects to the court's finding of fact VI on the ground that the same is not supported by any substantial evidence but is contrary to the evidence and there is no evidence to show that the said sum of $14,658.84 or any sum other than $2930.75 referred to was the avails of interest on collaterals applied on said primary obligation or at all, during said period or at all, or that after making the credits and deductions recited in said finding, or at all, the indebtedness of Lyon County Bank to The Reno National Bank was reduced to the sum of $9316.94 on the 21st day of October, 1936 or on any day or as of any day.

"III.

"Respecting the court's finding of fact VII, objects that the same is not supported by any substantial evidence but is contrary to the evidence insofar as it purports to state that by reason of the premises there was a balance of $6595.96 due from Lyon County Bank to The Reno National Bank by reason of the premises and the collections on the Carter and Wed-

> "'* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *'

no interest was chargeable or payable and no lien for interest was allowable, computed on the principal indebtedness as it existed on the day of insolvency, taking over and notice, respecting Lyon County Bank, as aforesaid. And no such interest or lien was payable or allowable because of the collateral-security agreements in evidence in this case which were entered into in contemplation of the provisions of said quoted statute.

"Objecting further complainant objects to the action of the court insofar as in its findings of fact and conclusions of law it has overruled and disregarded the objections heretofore made by complainant on August 11, 1938 to the proposed findings of fact, conclusions of law and judgment lodged and filed by defendant August 2, 1938, and insofar as it has rejected the proposed findings of fact, conclusions of law and judgment filed and submitted to the court on the 11th day of August, 1938.

"Objecting and specifying further complainant [118] objects to the action of the court insofar as it has in its findings of fact and conclusions of law and judgment proposed to be signed and entered, adopted the findings of fact and conclusions of law proposed by the defendant August 2, 1938 and particularly defendant's proposed findings of fact IV and V (which are the court's findings of fact V and VI) and defendant's proposed finding of fact VI (which is the court's finding of fact VII) and these objections are made on the grounds set forth in the complainant's objections to the defendant's proposed findings of fact and conclusions of law.

"And complainant objecting further objects to the omission from the findings of fact and conclusions of law by the court of that part of proposed finding of fact III reading as follows:

> " 'It was then and there agreed and contemplated by and between the parties that said security would be for the payment of whatever of principal or interest was then and there due, and also for the payment of whatever obligations by way of interest or otherwise that should be incurred after July 22, 1931. It was then and there agreed and understood in said agreements that any interest computed for any period after July 22, 1931, would be considered a liability of Lyon County Bank incurred in such period.'

"And also that part reading as follows:

" 'That no indebtedness to Reno National Bank was incurred and owing by the Lyon County Bank after July 22, 1931, from that time until February 16, 1932 (other than the principal sum in said promissory note amounting to $60,500.) except interest on said principal sum computed from January 1, 1932 to February 16, 1932, amounting to $605.'

and also the omission of complainant's proposed findings of fact VI, VII and VIII, which were proposed by complainant August 11, 1938.

"And Complainant asks that these objections be noted and that in the event they or any of them be overruled that they may have without further request, an exception noted in the record of this action.

"Dated September 8, 1938.

"A. L. HAIGHT

"GEORGE L. SANFORD

Attorneys for Complainant.'

"Received a copy of the foregoing Complainant's Objections this 15th day of September, 1938.

"N. J. BARRY

"Attorney and Solicitor for Defendant W. J. Tobin etc." [119]

Thereafter on the 14th day of September, 1938 the Complainant duly filed and served its petition for allowance of appeal and its Assignment of Errors and on the same day the court duly and regularly allowed said appeal and fixed a cost bond therefor and ordered that a certified transcript of the record, proceedings and documents on which the said judgment was made be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and ordered that the time for filing and serving complainant's bill of exceptions and complainant's praecipe to the clerk for copies of the record and the time for service of all citations be enlarged and extended to and including the 17th day of October, 1938.

And on the same day the court duly and regularly ordered that jurisdiction of the said action and the judgment term of the court be reserved and continued into and through the October, 1938 term of said court for all purposes connected with the said action.

And on the same day the complainant duly made and executed and caused to be executed its cost bond on appeal in the sum of $300, which was on that day duly approved and accepted by said court.

And on the same day citation on appeal was duly signed and regularly issued out of said court directed to the said defendant.

And on the same day the said Complainant's objections, Complainant's petition for allowance of appeal, Complainant's assignment of errors, Order

allowing appeal, fixing bond and extending time. Order reserving jurisdiction, cost bond on appeal and citation on appeal were duly and regularly served on the defendant, who acknowledged receipt on the face of the original papers and acknowledged receipt of true copies thereof delivered to him, and said original papers were re-delivered to the Clerk [120] of this court and said citation on appeal was returned and filed in this court, the last-named filing being the filing of the citation on appeal which was filed September 16, 1938.

Be it further remembered that the complainant has objected to the action of the court as aforesaid and objects to the action of the court as aforesaid and excepts as aforesaid and is deemed to object and except thereto.

And now in furtherance of justice and that right may be done, the complainant presents the foregoing as and for its bill of exceptions and statement of the evidence, in the above-entitled action and prays that the same may be settled, allowed, signed and filed as such.

A. L. HAIGHT
GEORGE L. SANFORD
Attorneys for Complainant

The undersigned N. J. Barry, for and on behalf of W. J. Tobin, as Receiver of The Reno National Bank of Reno, Nevada, a National Banking Association, Defendant in the above-entitled action, does hereby acknowledge the service on the 7th day of

October, 1938, of the above and foregoing bill of exceptions and statement of the evidence this 7th day of October, 1938, and, having examined the same, does agree that the same is true and correct and embraces all the evidence material to the issues relating to the point or points involved, and that the same may be allowed, settled, signed and filed and made part of the record in said action, and does hereby waive the right to be present at the settling and allowance of said bill of exceptions and statement of the evidence aforesaid.

N. J. BARRY

Attorney for Defendant [121]

And thereupon, on the 8th day of October, 1938, upon due notice to the said defendant and within the time limited and granted by the court therefor, and within the term of court in which said decision and judgment were made, signed, filed and entered, the foregoing bill of exceptions and statement of the evidence is duly tendered by the said Complainant for signing, settlement and allowance as the bill of exceptions in said cause, and the said complainant and defendant having agreed that the same is true and correct and that the testimony and evidence therein has been correctly set forth and summarized and condensed in narrative form;

It is ordered that the above and foregoing be and the same is herewith duly signed, certified and allowed as the bill of exceptions and statement of evidence in said cause, and as being true and cor-

rect, and the same is hereby made a part of the record in said cause and ordered to be filed as such.

FRANK H. NORCROSS
District Judge,
Trial Judge in said Cause.

Service, by copy of the foregoing Complainant and Appellant's Bill of Exceptions and Statement of the Evidence, is hereby admitted this 1st day of October, 1938.

N. J. BARRY
Attorney for Defendant

[Endorsed]: Filed Oct. 8, 1938. [122]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF THE RECORD.

To the Clerk of the Above Entitled Court:

You are requested to prepare and certify a transcript of record in the above entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed therein and include in such transcript of record the following, to-wit:

1. The complaint.
2. The answer.
3. The reply.
4. The opinion and decision and judgment of Hon. Frank H. Norcross, Judge of the above en-

titled court, signed, dated, filed, and entered the 16th day of June, 1938.

5. All notations of entry of judgment in the minutes, docket or judgment book of the clerk respecting the judgment of [123] June 16, 1938.

6. The findings of fact, conclusions of law, and judgment signed, dated, filed, and entered the 10th day of August, 1938.

7. All notations of entry of judgment in the minutes, docket, or judgment book of the clerk, respecting the judgment of August 10, 1938.

8. The minute entries or entries of orders and order or orders given, made and entered the 2nd day of September, 1938, setting aside previous acts and submitting all matters for further consideration.

9. The findings of fact, conclusions of law, and judgment made, signed, dated, filed, and entered the 8th day of September, 1938.

10. The minute order of court entered and noted by the clerk to effect that "if either party should desire any additional form of exceptions they may be called to the attention of the court and entered at any time." Said order having been announced September 8, 1938, in open court.

11. Petition for allowance of appeal filed September 14, 1938.

12. Assignment of errors on appeal filed September 14, 1938.

13. Order allowing appeal, fixing bond and extending time, signed and filed September 14, 1938.

14. Order reserving jurisdiction and extending time, signed and filed the 14th day of September, 1938.

15. Cost bond on appeal made, signed and executed the 14th day of September, 1938, and approved by order at the foot, all dated, signed, issued and filed the 14th day of September, 1938.

16. Citation on appeal issued, dated, signed the 14th day of September, 1938, and returned and filed the 16th day of September, 1938.

17. Affidavit and proof of service of complainant's [124] objections, complainant's petition for allowance of appeal, complainant's assignment of errors, order allowing appeal, fixing bond and extending time, order reserving jurisdiction, cost bond on appeal, and citation on appeal, said affidavit being sworn to the 16th day of September, 1938, and filed the 16th day of September, 1938.

18. Bill of exceptions or bills of exceptions filed or to be filed herein, and including the order of court settling the same.

19. Copies of original exhibits of plaintiff No.'s 1, 2, and 3; defendant's exhibits A and B.

20. The praecipe with proof and acknowledgment of service thereof.

Dated this 29th day of September, 1938.

A. L. HAIGHT and
GEORGE L. SANFORD,
Attorneys for Complainant.

Service by copy of the foregoing praecipe for transcript of record the 1st day of Oct., 1938, is admitted this 1st day of Oct., 1938.

N. J. BARRY,
Attorney for Defendant.

[Endorsed]: Filed Sept. 30, 1938. [125]

PLAINTIFF'S EXHIBIT NO. 1.

COPY

$60,500.00 Reno, Nevada, July 1, 1931

On Demand after date, without grace, for value received, Lyon County Bank a corporation, promises to pay to The Reno National Bank or order, at its banking office in Reno, Navada, The sum of Sixty Thousand Five Hundred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on Demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this

corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder.

[Seal] In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

LYON COUNTY BANK
By J. I. WILSON
President.

By GEO F. WILLIS,
Secretary.

No. 5166.

Form 188

(Attached to Pltff's. Ex. 1)

	Endorsements on Principal	
Date	Amount	Bal. due on Prin.
2-23-32	$ 1,000.	$59,500.00
3- 3-32	956.36	58,543.64
3- 8-32	180.00	58,363.64
5- 3-32	106.65	58,256.99
6- 1-32	106.65	58,150.34
2- 6-33	180.00	57,970.34
2-23-33	3,765.56	54,204.78
2-23-33	4,919.00	49,285.78
2-27-33	4,080.25	45,205.53

5-10-33		20.00	45,185.53
7- 8-33		4,481.79	40,703.74
4-20-34		150.00	40,553.74
4-20-34		50.00	40,503.74
11-30-34		1,499.23	39,004.51
12-24-34		5,000.00	34,004.51
2-19-35		4,135.78	29,868.73
2-25-35		2.45	29,866.28
4-19-35		3,643.31	26,222.97
5-31-35		3,976.88	22,246.09
6-10-35		14,306.16	7,939.93
6-17-35	(Red ink)	40.79	7,980.72
7- 2-35		456.74	7,523.98
10-24-35		2,000.00	5,523.98
1- 4-36		3,329.75	2,194.23
6-16-36		100.00	2,094.23
10-21-36		2,093.23	1.00

Endorsements on Interest

12-16-31	2,420.00	to 12-31-31
6-30-32	180.00	on acct.
6-30-32	660.00	"
7- 2-32	660.00	"
7- 8-32	106.65	"
8- 8-32	106.65	"
8-13-32	110.00	"
9- 8-32	106.65	"
10-14-32	106.65	"
2-23-33	574.44	"
2-23-33	866.25	"
2-27-33	498.00	to 11-5-32
2-27-33	9.77	on acct.
10-21-36	Balance due on Interest	$9,056.36
10-21-36	1,357.84	on Acct.
	Balance due on Interest	7,698.52

Clerk's Endorsement

No. 2721. U. S. Dist. Court, District of Nevada. Plff's Exhibit No. 1. Filed Mar. 18th, 1938. O. E. Benham, Clerk. By ....., Deputy. [126]

PLAINTIFF'S EXHIBIT 2.

$8000.00 Yerington, Nevada, June 20, 1930

Fifteen months after date without grace, for value received, we, jointly and severally promise to pay to Lyon County Bank or order in Yerington, Nevada, the sum of Eight Thousand Dollars in U. S. gold coin with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable semi-annually also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest, for non-payment of this note and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker or makers thereof. In the event of the non-payment of this said note at maturity, or its collection by litigation, we jointly and severally agree to pay all expenses that may be incurred thereby, including attorney's fee, and to that end bind ourselves, heirs, executors, administrators and assigns forever. For the purpose of attachment or levy of execution, this note

shall be payable wherever we may be situated at the option of the holder.

Signed NARCISO MONTELATICI
CONCETTA MONTELATICI
EUGENE MONTELATICI

Rediscounted with Reno
National Bank
No. 6539

Endorsement of the above as follows: "Paid Renewed 12/31/34 Lyon County Bank, Yerington, Nevada". Also "Paid Lyon County Bank, Yerington, Nevada".

Date	Payments Interest	Principal Balance

Name Narciso Montelatici, Concetta Montelatici, and Eugene Montelatici.
No. 6539 Date 6/20/30 Amount $8000.00
When due 15 mos. Interest, 8%
Endorsers or collateral Real and Chattel Mtg. on Hotel Patricia
Approved GFW JIW
Notice sent [127]

(ENDORSEMENT ON BACK)

Endorsement on Interest

May 3-32	$106.65	to Aug 20 1930
June 1-32	$106.65	to Sept 20 1930
July 8 1932	$106.65	to Dec 20 1930
Aug 8 1932	$106.65	to Feby 20 1931
Sept 8 1932	$110.65	to Apr 20 1931
Oct 14 1932	$106.64	to June 20 1931

		Endorsement on Principal	Balance Due on Principal
May 10	1933	$20	$7980.00
Apr 20	1934	$150–	$7830.

Insurance premium collected by Reno National—Not endorsed

"Paid" in green pencil written across last two items.

Clerk's Office Endorsement

No. 2721. U. S. Dist. Court, District of Nevada. Plff's Exhibit No. 2. Filed Mar. 18th, 1938. O. E. Benham, Clerk, By ..... Deputy. [128]

PLAINTIFF'S EXHIBIT No. 3

Oct. 22, 1936.

H. E. and Roena Carter
Wellington, Nevada

Dear Sir and Madam:

Re: Lyon County Bank Note.

This is to advise that I have received from the Nevada Livestock Production Credit Association $1523.00 for application on your indebtedness to this trust.

These funds have been applied as follows:

$1520.44 on your note dated February 21, 1933 to W. J. Tobin, Receiver, leaving a remaining principal balance due thereon of $1.00; interest on account of this note $2.56.

After giving effect to these applications your indebtedness to this trust is as follows:

Note #6795 originally to the Lyon County Bank Principal balance	$ 1.00
Accrued interest to Oct. 24, 1935	370.31
Note dated February 21, 1933 to W. J. Tobin, Receiver Principal balance	1.00
Accrued interest to Oct. 21, 1936	500.74
Total	$873.05

Yours very truly,

WEB:GR W. J. TOBIN,
Receiver.

c.c. Lyon County Bank

Clerk's Endorsement

No. 2721. U. S. Dist. Court, District of Nevada. Plff's Exhibit No. 3. Filed Mar. 18th, 1938. O. E. Benham, Clerk. By ....., Deputy. [129]

DEFENDANT'S EXHIBIT "A"

Treasury Department
Comptroller of the Currency
Washington

December 16, 1936

Mr. Walter J. Tobin, Receiver
The Reno National Bank
Reno, Nevada.

REFER CC-LD

Dear Sir:

This will acknowledge receipt of your letter of December 7, 1936 with enclosures referring to your Asset No. 552 representing a bills payable obligation due the Reno National Bank by the Lyon County Bank, now insolvent. You have enclosed a letter from the attorney representing the Lyon County Mortgage Corporation, liquidating Agent for the Lyon County Bank, taking exception to your position that you are entitled to payment in full of Asset No. 552 including interest up to the date of payment in full. You advise that there is now due your trust on Asset No. 552 the sum of $1.00 representing the principal amount due and $7698.52 representing the amount still due in the way of interest.

It is our understanding that you have applied from the collections made on the pledged assets representing both principal and income collections an amount sufficient to pay the bills

payable obligation with the exception of $1.00 due in the principal amount of the obligation and the amount you claim still to be due in the way of interest. It is also our understanding that the amount so applied by you represents not only collections made on the principal amounts due on the pledged assets but also collections made from these pledged assets which consist of income or interest accrued upon the assets after the date of closing of the Lyon County Bank. Under the rule stated in the case of Gamble v. Wimberly, 44 F.(2) 329, you are entitled to retain the pledged assets and apply toward interest due on your claim after suspension of the Lyon County Bank all income earned upon and collected from the pledged assets after the date of closing of the Lyon County Bank. It appears therefore that a portion of the collections made by you and applied toward payment of the principal amount due on the bills payable obligation represented in fact income or interest earned upon the pledged assets after the date of closing of the Lyon County Bank. If this is true, you should have applied toward the interest due on your bills payable obligation the income accrued upon and collected from the pledged assets after the date of closing of the Lyon County Bank. Such an application would have reduced the amount of interest still due on the bills payable obligation and increased the amount of principal still due

on this obligation, permitting you to receive on your claim against the Lyon County Bank dividends, under the rule stated by the Supreme Court in the cases of Merrill v. National Bank, 173 U. S. 131; 43 L. Ed. 640 and Aldrich v. Chemical National Bank, 176 U. S. 618; 44 L. Ed. 611 until the payment of dividends from the Lyon County Bank due on your claim and the collections made from the principal amount of the pledged assets would pay in full your claim. You are accordingly instructed to revise the principal and interest amounts still due on your claim against the Lyon [130] County Bank and furnish us with a statement indicating the amount still due in principal and interest on your claim against the Lyon County Bank. You will arrive at the amount still due by following the procedure hereinafter indicated:

1. Indicate the amount of collections from the pledged assets representing income due on these pledged assets and collected from the assets after the date of closing of the Lyon County Bank. This amount will be applied by you toward payment of the interest due on your claim after the date of closing of the Lyon County Bank.

2. Apply toward payment of the principal amount due on your claim all collections made from the pledged assets representing the principal amount due on the pledged

assets and actually collected from these assets.

3. In the event the amount of collections made from the income earned upon the pledged assets after suspension is more than sufficient to pay all interest due on your claim against the Lyon County Bank, the amount of such excess will be applied by you toward payment of the principal amount due on your claim against the Lyon County Bank.

We believe that our position relative to your rights against the Lyon County Bank is sustained by the decision handed down by the Ninth Circuit Court of Appeals on December 7, 1936 in the case of Douglass et al v. Thurston County, copy enclosed. In that opinion the Circuit Court of Appeals held that a secured creditor of an insolvent national bank was not entitled to interest from any source on his claim after the date of closing of a national bank. In the opinion, the court discussed the case of Washington-Alaska Bank v. Dexter Horton Nat'l Bank (C. C. A. 9th), 263 Fed. 304, 306-307. The County Treasurer relied upon that decision as sustaining his right to receive interest upon his secured deposit after the date of closing of the national bank. The Circuit Court of Appeals held with respect to this question "That case is easily distinguishable from the one at bar. There the na-

tional bank was the plaintiff, seeking to foreclose a lien on collateral given by a state bank. The national bank laws dealing with the question of interest, after insolvency, on deposits held by a national bank, were therefore not involved in that suit."

The Washington-Alaska Bank case above mentioned was decided in 1920. Your attorney should advise us whether or not there have been any changes in the Nevada laws relating to state banks or any court decisions construing the powers of state banks in Nevada which would now support the position of the attorney for the Lyon County Mortgage Corporation that no interest is properly payable on the bills payable obligation held by your trust after the date of closing of the Lyon County Bank. Please advise us fully relative to the opinion of your attorney in this question and also furnish the statement indicating the amount still due in principal and interest on your claim against the Lyon County Bank. [131]

Very truly yours,
KIT WILLIAMS
s/ Kit Williams
Executive Assistant Counsel
Comptroller of the Currency.

Enclosures
DM

Clerk's Endorsement

Certified Copy D.C. Form No. 30

United States of America,
District of Nevada—ss:

I, O. E. Benham, Clerk of the United States District in and for the District of Nevada, do hereby certify that the annexed and foregoing is a true and full copy of the original Defendant's Exhibit No. A, filed March 18, 1938, in the case of Lyon County Bank Mortgage Corporation vs. W. J. Tobin, Receiver, Etc., No. 2721; now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Carson City this 21st day of March A. D. 1938.

[Seal] O. E. BENHAM,
Clerk.
O. F. PRATT,
Deputy Clerk. [132]

[Endorsed]: No. 2721. U. S. Dist. Court, District of Nevada. Deft's Exhibit No. "A". Filed Mar. 18th, 1938. O. E. Benham, Clerk. By ....., Deputy. [133]

DEFENDANT'S EXHIBIT "B"

$60,500.00 Reno, Nevada, July 1, 1931

On demand after date, without grace, for value received Lyon County Bank a corporation, promises to pay to

The Reno National Bank

or order, at its banking office in Reno, Nevada the sum of Sixty thousand five hundred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or

any of its property may be situated, at the option of the holder.

[Seal] In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

LYON COUNTY BANK
By J. I. WILSON
President

GEO F. WILLIS
Secretary

No. 5166.
Form 188

(On Back)

	Endorsement on Principal		Balance due on Principal
Philatro & Jones	2-23-1932	$1000.	$59,500.
Offset	3- 3-1932	$ 956.36	$58,543.64
Sec. Corp coupons	3- 8-1932	$ 180.00	$58,363.64
Montelatici	5- 3-1932	$ 106.65	$58,256.99
do	6- 1-1932	$ 106.65	$58,150.34
Mtg. Sec. Coup	2- 6-1933	$ 180.00	$57,970.34
H. E. Carter	2-23-1933	$3765.56	$54,204.78
E. S. Wedertz	" "	$4919.00	$49,285.78
L. L. Wedertz	2-27-1933	$4080.25	$45,205.53
Montelatici	5-10-33	20.00	45,185.53
Jones	7- 8-33	4481.79	40,703.74

Endorsement on Interest		
12-16-1931	$2420.00	to 12-31 1931
6-30-1932	$ 180.00	on acct Mtg. Sec. Cp
6-30-1932	$ 660.	" " Walker River Cp.
7- 2-1932	$ 660.	" " "
7- 8-1932	$ 106.65	" " Montelatici
8- 8-1932	$ 160.65	" " "
8-13-1932	$ 110.00	" " Simpson
9- 8-1932	$ 106.65	" " Montelatici
10-14-1932	$ 106.65	" " "

2-23-1933	$ 574.44	" "	H. E. Carter
2-23-1933	$ 866.25	" "	E. S. Wedertz
2-27-1933	498.00 to 11-5-32		L. L. Wedertz
"	9.77 on acct.		do

	Endorsement on Principal		Balance due on Principal
Montelatici	4-20-1934	$ 150.00	$40,553.74
Philatro & Jones	" "	$ 50.00	$40,503.74
Mtg. Sec. Cp.	11-30-34	1499.23	39,004.51
Montelatici	12-24-1934	$5000.00	$34,004.51
Jones	2-19-1935	$4135.78	$29,868.73
"	2-25-35	2.45	29,866.28
"	4-19-1935	$3643.31	$26,222.97
Yparraguirre	5-31-1935	$3976.88	$22,246.09
Walker Bonds	6-10-35	14306.16	7,939.93
Yparraguirre	6-17-35 (red)	40.79	7,980.72
Koenig	7- 2-1935	456.74	$ 7,523.98
H. E. Carter	10-24-1935	$2000.00	$ 5,523.98
L. L. Wedertz	1- 4-36	3329.75	2,194.23
Jones Comp.	6-16-36	100.00	2,094.23
Carter Wed.	10-21-1936	$2093.23	1.00
			Balance
			9056.36
Carter Wed.	10-21-1936	$1357.84 on acct	7698.52
"	10-29-1937	$ 873.05 "	6825.47

This is to certify that this is a true and correct copy of original note which I hold.

/s/ W. J. TOBIN
Receiver, The Reno National Bank

$60,500.00 Reno, Nevada, July 1, 1931

On demand after date, without grace for value received Lyon County Bank a corporation, promises to pay to The Reno National Bank or order, at its banking office in Reno, Nevada, the sum of Sixty Thousand Five Hun-

dred 00/100 Dollars in lawful money of the United States, with interest thereon at the rate of eight per cent per annum from date until paid. Interest payable on demand, also after judgment.

The endorsers, sureties, guarantors and assignors, severally waive presentation for payment, protest and notice of protest for non-payment of this note, and all defenses on the ground of any extension of time of its payment that may be given by the holder or holders, to them or either of them, or to the maker thereof. In the event of the non-payment of this said note at maturity, or its collection by suit, this corporation agrees to pay all expenses that may be incurred thereby, including a reasonable attorney's fee, and to that end binds itself, its successors and assigns forever. For the purpose of attachment or levy of execution, this note shall be payable wherever this corporation, or any of its property may be situated, at the option of the holder.

In witness whereof, the said corporation has caused this instrument to be executed and its corporate seal to be hereunto affixed by its proper officers first thereunto duly authorized.

[Seal] LYON COUNTY BANK
By /s/ J. I. WILSON
President

By s/s GEO. F. WILLIS
Secretary

No. 5166
Form 188

(On the back)

Corrected applications under instructions of the Comptroller of the Currency December 16, 1936.

	Endorsement on Principal	Balance Due on Principal
2-16-1932	$ 956.36	$59,543.64
2-23-32	$1000.00	$58,543.64
3- 8-32	$ 180.00	$58,363.64
5- 3-32	$ 106.65	$58,256.99
6- 1-32	$ 106.65	$58,150.34
2-23-33	$3765.56	$54,384.78
2-23-33	$4919.00	$49,465.78
2-27-33	$4080.25	$45,385.53
7- 8-33	$1947.11	$43,438.42
11-30-34	989.23	42,449.19
12-24-34	3403.61	39,045.58

	Endorsement on Interest		
12-16-31	$2420.00	to 12-31	1931
6-30-32	$ 180.00	on acct	
"	$ 660.	"	
7- 2-32	$ 660.	"	
7- 8-32	$ 106.65	"	
8- 8-32	$ 106.65	"	
8-13-32	$ 110.	"	
9- 8-32	$ 106.65	"	
10-14-32	$ 106.65	"	
2-16-33	$ 180.00	"	
2-23-33	574.44	"	
"	$ 866.25	"	
2-27-33	507.77	"	
5-10-33	20.00	"	
7- 8-33	2534.68	7-8-33	
Balance forward			$39,045.58

	Endorsement on Principal	Balance Due on Principal
2-19-35	$2334.82	$36,710.76
4-19-35	$3490.92	$33,219.84
5-31-35	$1841.01	$31,378.83
6-10-35	$14236.42	$17,142.41

7- 2-35	372.94	$16,769.47
10-24-35	$1582.70	$15,186.77
1- 4-36	$3090.16	$12,096.61
10-21-36	$1256.67	$10,839.94
"	1523.00	9,316.94

Endorsement on Interest

4-20-34	$ 150.00	on acct.
4-26-34	$ 50.00	"
11-30-34	$ 510.00	"
12-24-34	$1596.39	"
2-19-35	$1800.96	"
2-25-35	$ 2.45	"
4-19-35	$ 152.39	"
5-31-35	$2095.08	to 5-31-35
6-10-35	$ 69.74	to 6-10-35
7- 2-35	$ 83.80	to 7- 2-35
10-24-35	$ 417.30	to 10-24-35
1- 4-36	239.59	to 1- 4-36
1-16-36	100.00	on account
10-21-36	671.40	to 10-21-36

This is to certify that this is a true and correct copy of corrected applications under instructions of the Comptroller of the Currency Dec. 16, 1936.

/s/ W. J. TOBIN,
Receiver, The Reno National Bank

Clerk's Endorsement

No. 2721. U. S. Dist. Court, District of Nevada. Deft's Exhibit No. "B". Filed Mar. 18th, 1938. O. E. Benham, Clerk. By ....., Deputy. [134]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of Lyon County Bank Mortgage Corporation, a corporation, vs. W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, said case being No. 2721 on the law docket of said Court.

I further certify that the attached transcript, consisting of 138 typewritten pages numbered from 1 to 138, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that the cost of preparing and certifying to said record, amounting to $78.05, has been paid to me by Lyon County [135] Bank Mortgage Corporation, a corporation, the appellant in the above entitled cause.

And I further certify that the original citation, issued in said cause, is hereto attached.

Witness my hand and the seal of said United States District Court this 27th day of October, A. D. 1938.

[Seal] O. E. BENHAM,
Clerk, U. S. District Court,
District of Nevada. [136]

[Title of District Court and Cause.]

CITATION ON APPEAL.

The United States of America—ss:

The President of the United States of America.

To W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, Defendant:

You are hereby cited and admonished to be and appear before the United States Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's office of the United States District Court for the District of Nevada, wherein Lyon County Bank Mortgage Corporation, a corporation, the above named complainant, is appellant and you are the appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Norcross, United States [137] District Judge for the District of Nevada, this 14th day of September, 1938.

[Seal] FRANK H. NORCROSS,
United States District Judge.

Receipt of a copy of the foregoing citation admitted this 15th day of September, 1938.

N. J. BARRY,
Attorney for Defendant.

[Endorsed]: Filed Sept. 16, 1938. [138]

[Endorsed]: No. 9019. United States Circuit Court of Appeals for the Ninth Circuit. Lyon County Bank Mortgage Corporation, a corporation, Appellant, vs. W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed October 28, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),
Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLANT'S BRIEF.

GEORGE L. SANFORD,
Carson City, Nevada,
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Fallon, Nevada,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLANT'S BRIEF.

BASIS OF JURISDICTION.

Lyon County Bank Mortgage Corporation, a corporation, appeals from the judgment entered September 8, 1938, in the District Court of the United States for the District of Nevada, Hon. Frank H. Norcross, United States District Judge, presiding, in the case of Lyon County Bank Mortgage Corporation, a corporation, complainant v. W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, defendant. No. 2721 in

said court (Judgment Tr. p. 61) superseding the judg ment of September 2, 1938 (Tr. pp. 52-53) and th opinion and decision of June 16, 1938. (Tr. pp. 41-5 23 Fed. Supp. 763.)

Jurisdiction in the District Court is conferred b the Judicial Code, Section 24 (1) as amended. (Tit 28 U.S.C.A. 41 (1).) It is a "suit of a civil natu at common law". The matter in controversy exclusi of interest and costs, exceeds the sum or value \$3000 and it arises under the laws of the Unite States.

The value of the matter in controversy is set ou in paragraph XI of the complaint (Tr. p. 8) a \$4736.90. See, also, counterclaim in answer, paragrap V (Tr. p. 25) drawing in question defendant's clair for \$9316.94.

The defendant is sued "as Receiver," etc. Para graph VIII of the complaint alleges the insolvenc of The Reno National Bank on December 9, 1932 and the appointment of the receiver on that day b the Comptroller of the Currency of the United State pursuant to the laws of the United States and th continued status of the defendant as receiver. (Tr p. 6.) Such appointment, duties and powers are pro vided for by the National Bank Act (12 U.S.C.A Sec. 21 et seq.) with special reference to 12 U.S.C.A Sec. 191-192.

Reference is made again to paragraph V of the counterclaim (Tr. p. 25), claiming there is \$9316.9 due from plaintiff to defendant. This constitutes a civil suit at common law by "any officer thereof"

(f the United States) "authorized by law to sue." (udicial Code Sec. 24 (1), Title 28 U.S.C.A. Section (1).) (Authority to Sue. Title 12 U.S.C.A. Sec. 1-192.)

This court has jurisdiction in this appeal by reason the Judicial Code Section 128, Title 28 U.S.C.A., ection 225, subdivision (a) First, and (b). There no direct review by the Supreme Court under the udicial Code Section 238 (Title 28 U.S.C.A. Sec. 5). No question of jurisdiction was drawn in issue exists. Appeal properly taken. (Tr. pp. 61-75 inc.) itle 28 U.S.C.A. 230; Federal Rules of Civil Pro-edure, Rule 73.

The judgment is one in the district court and ap-ears in the transcript, page 61.

STATEMENT OF THE CASE; QUESTIONS INVOLVED AND HOW RAISED.

There is one major question of law in the case and ne major question of fact. The question of law is rawn in issue by the pleadings and requests for find-ngs and judgment.

ssues tried.

As stated by the court in its opinion (Tr. p. 43), and as announced by counsel for the respective parties at the commencement of the trial, and as indicated by the letter from the Comptroller of the Currency to the defendant dated December 16, 1936 (Tr. pp. 162-6), the only issues presented to the court for determination were:

The question of law as to whether (1) under Sec. 53 of the Nevada Banking Act of 1911 no interest whatever could be demanded by the defendant upon his claim after the date of insolvency of the Lyon County Bank, as contended by the complainant, or whether (2) the rule recognized by *Gamble v. Wimberly* (44 Fed. (2d) 329) should apply and the defendant should be permitted to retain on account of interest on the main obligation such interest income as was earned by the underlying securities following the date of insolvency and as was collected by The Reno National Bank of the defendant receiver, as contended by the defendant; and

(A) If the court should hold in favor of the application of the rule in *Gamble v. Wimberly,* then the question of fact was presented as to the amount of interest so earned and collected and subject to such application.

1 (a) The pleadings draw in issue the question of law as follows:

Complaint. (Tr. pp. 1-10.)

Paragraph IV alleges the promissory note of Lyon County Bank.

Paragraph V alleges the collateral security agreements.

Paragraph VI alleges the insolvency of the state bank, February 16, 1932; the taking over and the knowledge of the creditor.

Paragraph VII alleges the nature of the creditor's claim setting out the amount claimed on principal as of June 1, 1932, at $58,150.34. (Tr. pp. 11, 16.)

Paragraph IX alleges the successorship of the complainant.

Paragraph X alleges:

> "* * * that on February 16, 1932, the amount owing upon the said promissory note of July 1, 1931, by said Lyon County Bank to said The Reno National Bank, including interest to that date, was the sum of Sixty-one Thousand One Hundred Five Dollars ($61,105.); and that the said Lyon County Bank was not otherwise indebted to said The Reno National Bank;"

Paragraph XI alleges that since February 16, 1932, payments aggregating $65,841.90 were received "on account of the indebtedness upon which the claim filed as aforesaid was founded; * * * that said defendant and said The Reno National Bank have received payment of the sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90) in excess of the amount to which they were entitled, * * *"

Paragraph XII alleges that in addition The Reno National Bank retains certain collaterals.

The answer (Tr. pp. 23-25), paragraph I, admits that $65,841.90 has been received. It denies that the claim and indebtedness have been fully paid; "denies that defendant has received the sum of $4,736.90, or any sum, in excess of the amount to which he was entitled".

Paragraph IV of the counterclaim in the answer (Tr. p. 24) alleges that after applying $14,658.84 "to the payment of the interest due on said primary obligation of the Lyon County Bank up to said 21st day

of October, 1936 and the balance remaining after th application of the interest on said primary obligatio as aforesaid, said balance * * * reduced said indebted ness on said 21st day of October, 1936 to the sum o $9,316.94".

(This is equivalent to alleging that since July 1 1931, interest accrued on the note for $60,500.00 i the amount of $14,658.84. Inasmuch as the interest o said note from date to February 16, 1932, wa $3025.00 the allegation asserts that since February 1 1932, the claim carried interest amounting t $11,633.84.)

In the reply (Tr. pp. 26-37) in paragraph I (Tr at p. 28, lines 1 and 2) it is alleged "no such interes could be paid from such insolvent estate, without mak ing a preference forbidden by law; * * *" and i paragraph IV the complainant repeats "That th actual primary obligation, including all interest du or allowable, was Sixty-One Thousand One Hundre Five Dollars ($61,105.)". This is repeated in th reply paragraph III (Tr. at p. 32) "That by reaso of the stoppage of interest by insolvency the primary obligation and valid claim never exceeded Sixty-On Thousand One Hundred Five Dollars ($61,105.)".

1 (b) The objections and requests respecting find ings also raise the question of law, as follows:

In the bill of exceptions (Tr. pp. 75-152) in para graph V of defendant's proposed findings (Tr. p. 126) the defendant incorporated the theory that interes accrued on the claim after February 16, 1932.

In the complainant's objections and proposed substitute findings (Tr. pp. 128-139) objection IV (Tr. p. 130) was made to said finding V. Complainant proposed a finding V (Tr. p. 135) to effect that "The claim of The Reno National Bank on February 16, 1932, the date of insolvency and taking over by the state bank examiner, was $60,148.64 *and never increased thereafter*". (Italics ours.)

In the complainant's objections (Tr. pp. 142-148) to the court's findings of fact it was objected (Tr. pp. 145-146) that by reason of the provisions of Section 53 of the State Banking Act of 1911

> "no interest was chargeable or payable and no lien for interest was allowable, computed on the principal indebtedness as it existed on the day of insolvency, taking over and notice, respecting Lyon County Bank, as aforesaid. And no such interest or lien was payable or allowable because of the collateral-security agreements in evidence in this case which were entered into in contemplation of the provisions of said quoted statute."

Objection was also noted (Tr. p. 146) insofar as the court overruled and disregarded the objections and proposed findings previously submitted. (Tr. pp. 128-139.)

2 (a) The pleadings draw in issue the question of law (as to the application of avails) as follows:

The complaint, paragraph XI (Tr. pp. 7-8) alleges defendant received $65,841.90 since February 16, 1932, "and that said claim and indebtedness has been fully paid".

The answer, paragraph I (Tr. p. 23) denies this.

The counterclaim, paragraph IV (Tr. p. 24) alleges the indebtedness remains $9316.94.

The reply, paragraph III (Tr. pp. 32-33) alleges:

> "Complainant alleges that the said receiver, W. J. Tobin, without right, retained interest on collaterals accrued after insolvency of Lyon County Bank, amounting to Twenty-Nine Hundred Thirty and 75/100 Dollars ($2,930.75), but even in such case *he should have applied only Sixty-One Thousand One Hundred Five Dollars ($61,105.) to the claim against the insolvent bank estate and should have refunded Eighteen Hundred Six and 15/100 Dollars ($1,806.15) to the debtor, besides surrendering the remaining collaterals.* That there is no balance due on the primary obligation, or by reason of any valid claim either in the sum of Ninety-one Hundred Thirty-Six and 94/100 Dollars ($9,136.94) or in any other sum." (Italics ours.)

2 (b) The question of law is also raised by the objections and requests respecting findings.

Paragraph V of defendant's proposed findings of fact (Tr. p. 126) is based on the theory that interest avails from collaterals should be applied on the interest in the primary obligation and that principal avails from collateral should be applied on the principal of the primary obligation; and it states that this is what was actually done.

This was objected to by complainant, paragraph V (Tr. p. 130), on the ground that it is "not warranted by the evidence and is contrary to the evidence".

In paragraph VIII (Tr. p. 130) the conclusions of law were objected to on the ground "that they are not made from any valid finding of fact and are not based in fact or law".

In complainant's objections to the findings it is objected (paragraph V, Tr. p. 145):

> "Objects as a matter of law that even if a charge or lien for any such interest were not barred by statute, then The Reno National Bank would be permitted only to retain the collaterals and apply the interest avails on the collaterals (accrued and collected subsequent to the insolvency, to-wit, the sum of $2930.75) to the said alleged interest on the primary obligation and apply the principal-avails on said collaterals to the said alleged principal of the primary obligation, and it could not apply the principal-avails from the collaterals to the discharge of the alleged interest on the primary obligation, and it could not retain the collaterals any longer than until the principal of the primary obligation had been fully paid."

Objection was also made to the court's action on the former objections. (Tr. p. 146.)

A. The question of fact as to what sums were collected as avails from the collaterals and what were interest avails and what principal avails, conceivably would not arise at all on appeal, were it not for two mutually antagonistic findings of fact by the trial judge, which in themselves call for a directed finding and judgment. The undisputed evidence requires a directed finding and judgment for complainant.

It is conceded that the total sums collected as avails from the collaterals from February 16, 1932, to October 21, 1936, were $65,841.90 less $956.36 which was an offset.

There is a conflict in the findings as to how much of this sum was interest from collaterals and how much was principal from the collaterals.

In the final findings by the court of September 8 1938 (Tr. pp. 55-60), finding IV (Tr. pp. 57-58) was to the effect

> "Interest accrued and was collected and retained by the said bank and defendant, being *avails and proceeds from the said collaterals and securities* covering the period from February 16, 1932, to and including October 21, 1936, in the total amount of $2930.75 as follows, * * *" (Setting out the list, Tr. p. 58.) (Italics ours.)

Finding V immediately following (Tr. p. 58) is:

> "That payments aggregating the said sum of $65,841.90 were received by the defendant and The Reno National Bank since February 16, 1932 on account of the indebtedness upon which a claim had been filed by defendant, and that of said sum, the sum of $14,658.84 had been collected *as interest on said collateral securities* accruing after the date of insolvency of said Lyon County Bank." (Italics ours.)

The evidence supports finding IV and no evidence supports finding V.

The evidence consists of the testimony of witness Tobin (appellee) for complainant called as an ad-

erse witness (Tr. pp. 76-110); witness Blair for the omplainant (Tr. pp. 110-111) and witness Butler for efendant (Tr. pp. 111-114); plaintiff's exhibit No. (Tr. pp. 77-79); plaintiff's exhibit No. 2 (Tr. pp. 8-90); plaintiff's exhibit No. 3 (Tr. p. 89); defendnt's exhibit "A" (Tr. pp. 94-98); defendant's exibit "B". (Tr. pp. 100-103.)

In addition there was used as if an exhibit the abulation annexed to plaintiff's reply, denominated 'Exhibit A". (See Tr. p. 87.)

Appellee will doubtless agree that the court reporter's typewritten transcript from which the statement of evidence is summarized, shows on page 18, ine 9, that this "Exhibit A" is defendant's "file 2250" identified by the witness Tobin and pronounced o be correct.

It will be further noted that the testimony of witness Tobin (Tr. p. 81) was received in conjunction with plaintiff's Exhibit 2 (Tr. pp. 88-90; 158-160) and the court took the exhibit as controlling respecting the endorsements of interest and to what period. It is the only exhibit of the fact that is in evidence.

The tabulation from which witness Tobin testified recites two versions of the transactions recorded, both respecting the source of collected avails and the credits of the same on the obligation of the Lyon County Bank.

These recitals are of doubtful weight to show what happened or what should have happened.

These two records purport to account for $65,841.90. The record on collections excludes the $956.36 offset.

The records are as follows:

On collections from the obligors on the collaterals:

	Principal	Interest
Original	$59,702.62	$ 5,182.92
Revised	* 41,766.57	23,118.97

Note that the revision of collections takes $17,936.05 from the principal avails and attributes it to interest avails. A question of fact.

On credits to Lyon County Bank:

	Principal	Interest
Original	$60,499.00 (Bal. $1.)	$ 5,342.90 (on account)
Revised	$51,183.06 (Bal. $9,316.94)	$14,658.84

Note that the revision of credits takes $9315.94 from the credit on principal and credits it on interest.

By claiming a balance of $9315.94 the revision of credits increases the demand by that sum over the $65,841.90 already received in gross.

The revision of credits computes the gross obligation at $75,158.84 whereas the complainant computes it at $61,105.00 gross.

This difference of $14,053.84 lies in the final credit for $14,658.84 interest, less interest from December 31, 1931, to February 16, 1932, paid February 16 1932, amounting to $605.00.

*On the tabulation as of "2-6-33" this is $41,586.57 but there is an obvious omission of $180.00.

In addition there is a shift in the identity of the sums between the record of collections and the record of credits.

In the original record of collections and credits $159.98 is changed from principal character to interest character and in the revised record of collections and credits $8460.13 is changed from principal character to interest character.

The total of changes is $8620.11 and it accounts for the variance of $8620.11 between the revised collateral changes ($17,936.05) and the revised primary changes ($9315.94).

The tabulation therefore is but a "fable agreed on" and must give way to the facts as to what was done and the law as to what should have been done.

There are further questions as to the transactions after suit (filed April 2, 1937) was commenced. These relate to the transactions of October 29, 1937, and November 15, 1937, involving alleged collections of $1095.00 and $873.05 respectively. These are discussed in the argument.

ASSIGNMENTS OF ERROR RELIED ON.

Appellant relies on all the assignments of error which appear in the transcript, pages 63 to 68 inclusive, excepting only assignments VIII and IX which are now deemed argumentative.

Assignments I, II and III are general and ultimate and depend on the others.

Assignments IV, V and VI involve the general rule that interest on a claim stops with insolvency. They will be grouped together for argument.

Assignments VII and XIV involve the Nevada law forbidding a charge or lien for a liability incurred after insolvency and taking over of a state bank. They will be grouped together for argument.

Assignment X involves the contract of the parties in the light of the collateral security agreements of July 22, 1931.

Assignments XI and XIII involve the changed record of the transactions; the accounting by defendant; the legality of the defendant's application of avails from collaterals as credits on his claim and the court's refusal to find on this material issue. These will be grouped together for argument.

Assignment XII cites as error the trial court's refusal to make the special findings requested and asserts that the other findings not requested are not supported by the evidence.

SUMMARY OF ARGUMENT.

1. **Statement of facts.**
2. **Issues tried.**

The question of law is whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and whether the rule requiring a ratable distribution to creditors permits any claim

to be increased by interest after insolvency, or permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest.

The question of fact is as to the amount of interest accrued and collected from the collaterals after insolvency.

3. **Errors in the case.**

A. The court erred in permitting interest to be charged on the obligation after insolvency and added to the claim, contrary to the Nevada statute.

a. The Nevada statute is founded on the police power.

b. The case is governed by the Nevada statute solely and exclusively.

B. The court erred in permitting the claim of the secured creditor to be increased by interest computed over any period after insolvency and in permitting the secured creditor to retain any interest accrued and collected on the collaterals, except the interest accrued and collected on the collaterals after insolvency, and in not requiring all other collections on the collaterals to be applied on the claim without interest added after insolvency, all the same being contrary to the rule requiring a ratable distribution to creditors.

C. The collateral security agreements record the contract between the debtor and creditor and on the two possible interpretations thereof they impair the collection of interest on the obligation, in the light of both the law and the contract.

D. The attempted revision of the credits by way of a new record of collections and credits, was inadmissible and illegal and the issue of fact is to be decided according to what was done rather than on a tabulation purporting to record what was done. There is but one original note. (Exhibit "B", Tr. pp. 169-170.) Plf's Exhibit 1. (Tr. pp. 155-157.) There is but one document showing source of collections. (Plf's Exhibit 2, Tr. pp. 158-159-160.)

E. The special findings requested by the complainant should have been made by the court, because they were supported by the evidence and there was no evidence to support findings to the contrary.

F. The court should have decided the material issue as to the legality of the so-called revisions of the record as to the collections on the collaterals and the application of credits on the obligation. The allegations of fact in the answer to the counterclaim are not replied to and are to be deemed admitted.

G. The evidence shows that out of all the $65,841.90 collected by The Reno National Bank and credited to Lyon County Bank, only $2930.75 was avails by way of interest on collaterals realized in the period from February 16, 1932, to October 21, 1936. That if interest on a secured obligation does not stop with insolvency, said sum of $2930.75 only,

s creditable upon said interest, the balance is credi-able upon the principal, and the secured creditor must account for the overplus and the unexhausted collaterals.

ARGUMENT.

This cause was tried on March 18, 1938, before the court without a jury, resulting in a judgment that the plaintiff (appellant) take nothing and that the defendant (appellee) recover his costs. The situation presented to the trial court was as follows:

STATEMENT OF FACTS.

Lyon County Bank was a corporation organized under the Nevada Banking Act of 1911 and was engaged in the general banking business at Yerington, Nevada. On July 1, 1931, the Lyon County Bank borrowed the sum of $60,500 from The Reno National Bank, a national bank, with its principal place of business at Reno, Nevada, giving its promissory note therefor, bearing interest at the rate of eight per cent. per annum.

On July 22, 1931, the Lyon County Bank executed and delivered three certain collateral security agreements (Tr. pp. 16, 18 and 20) to The Reno National Bank and delivered and deposited with the said bank as a part of the transaction the following described property, to-wit:

6—$1,000.00 First Lien Coupon Certificates of the Mortgage Security Corporation of America.

22—$1,000.00 par value Walker River Irrigation District 6% Bonds.

Note of Loraine L. & J. Wedertz for $5,000.00, dated May 15, 1931.

Note of Elmer S. & Cora H. Wedertz for $7,300.00, dated Feb. 27, 1931.

Note of H. E. & Roena W. Carter for $5,500.00, dated May 1, 1931.

Note of Montelatici et als., for $8,000.00, dated June 20, 1930.

Note of David Jones et als., for $16,500.00, dated Feb. 27, 1930.

Note of Yparraguirre, P. M. & Bertha, for $24,800.00, dated June 15, 1931.

Together with mortgages given to secure the payment of each of the six above described promissory notes.

On December 16, 1931, the Lyon County Bank paid to The Reno National Bank $2,420.00 as interest on the $60,500.00 loan, which paid the interest to January 1, 1932.

On February 16, 1932, it was found that the Lyon County Bank was insolvent, and on the last mentioned date the bank was taken over by the state bank examiner. Thereafter, during the liquidation, pursuant to judgment and decree entered October 26, 1933, in the First Judicial District Court of the State of Nevada, in and for Lyon County, and in conformity with the provisions of the state banking laws relating to banks and particularly the Banking Act of 1933, the bank examiner conveyed and set

over all the property of the Lyon County Bank to the Lyon County Bank Mortgage Corporation, a statutory (Nevada) liquidating corporation, which comprises the creditors of the said insolvent bank. The Lyon County Bank Mortgage Corporation is the complainant and appellant.

At the time of the closing of the Lyon County Bank there was accrued and unpaid interest for one and one-half months on the note of $60,500.00 amounting to $605.00, making a total of $61,105.00 unpaid on principal and interest due The Reno National Bank on the day the Lyon County Bank closed. On the same day, February 16, 1932, the insolvent bank had on deposit with The Reno National Bank, as a correspondent, $956.36. This sum of $956.36 was thereafter, on March 3, 1932, applied as an offset on account by The Reno National Bank. Applying the offset on the date of insolvency, it would result in the sum of $60,148.64 principal and interest unpaid to The Reno National Bank on that date. On September 1, 1932, The Reno National Bank filed with the state bank examiner its claim for $58,150.34 principal as of June 1, 1932, against the Lyon County Bank, Exhibit X of the complaint. (Tr. p. 11.)

In explanation of the reference in the claim to the F. W. Simpson note of $5,000.00, may we say that this was a separate transaction and that this note was paid in full and hence is eliminated from consideration in the instant case, except to this extent: On August 13, 1932, the state bank examiner remitted to The Reno National Bank funds of the Lyon County Bank in the sum of $110.00 to pay interest on the

Simpson note then held by The Reno National Bank. As it happened, however, Simpson had previously made remittance to The Reno National Bank of this installment of interest. The Reno National Bank thereupon appropriated the state bank examiner's remittance and applied it on account of *interest* on the $60,500.00 note.

The Reno National Bank closed its doors on or about October 31, 1932, and W. J. Tobin was appointed as receiver on December 9, 1932, or thereabouts, and since that time said bank has been in liquidation.

At various times The Reno National Bank and its receiver collected divers sums from the securities deposited with it by the Lyon County Bank, as principal and interest, and applied the same specifically as brought out in the testimony. (Tr. pp. 38 and 39.) The amounts so collected aggregated $65,731.90, which with the Simpson item of $110.00 added amounts to $65,841.90, as of October 21, 1936. As these payments were received they were applied by The Reno National Bank and its receiver against the $60,500.00 note as follows: $60,499.00 account principal, and $5,342.90 account interest.

Subsequently, following a demand on the part of the Lyon County Bank Mortgage Corporation for an accounting, the defendant receiver attempted to make a revision of the credits upon the primary indebtedness of $60,500.00 and also upon the underlying securities, even though most of the underlying securities had been settled and returned to the makers upon the basis of the original application of payments.

Under the plan of revision as adopted by the receiver the amount of interest endorsements upon the sub-collateral or underlying securities was increased from $5,182.92 to $23,118.97 (Tr. p. 39), and the amount appropriated as interest against the primary obligation was increased from $5,342.90 to $14,658.84. (Tr. p. 39.) Also, the balance due upon the primary obligation was increased from the sum of $1.00 to the sum of $9,316.94. (Tr. p. 38.)

As a matter of fact, however, the amount of interest on the underlying securities which accrued after the date of closing of the Lyon County Bank and which was collected by The Reno National Bank or its receiver was not the sum of $5,182.92, nor the sum of $23,118.97, nor the sum of $14,658.84 referred to by the court (Tr. pp. 39 and 58), but the total amount so accrued and collected was the sum of $2,930.75. (Finding IV, Tr. pp. 57-8.) (See Plaintiff's Exhibit 2, Montelatici interest credits. (Tr. pp. 158-160.))

In addition to the above, the defendant, on October 15, 1937, collected on the pledged security of E. S. Wedertz the sum of $1,095.00, and on October 29, 1937, the defendant collected on the pledged security of H. E. Carter the further sum of $873.05, or $1,968.05 in all, making a total of $67,809.95 received by The Reno National Bank and its receiver, or $6,704.95 in excess of the $61,105.00 due at the time of the closing of the Lyon County Bank.

(Note. The court found (Finding VII, Tr. p. 59) that on October 29, 1937, the defendant col-

lected from Carter the sum of $1,625.99. Unfortunately such was not the case. The sum of $1,625.99 represents the balance shown by the exhibit (Tr. p. 38) to have been due on the Carter paper as principal on October 21, 1936, after the so-called revisions had been made by the defendant, but the defendant, on October 29, 1937, accepted from Carter the sum of $873.05 in full settlement of his obligation and cancelled and returned his note. (Tr. pp. 108-10.) However, the sum of $1,625.99, together with interest on that amount at 8% per annum, less the sum of $873.05, forms a part of the sum of $9,316.94 claimed by the defendant to be due as a result of the revised setup.)

The defendant still has in his possession not only the above-mentioned sum of $6,704.95, but also certain securities, as follows:

The E. S. Wedertz note of February 27, 1931, for $7,300.00 which, according to the defendant's testimony (Tr. p. 91), carries an unpaid balance of $1,150.93 principal, with interest at the rate of 8% per annum paid to February 22, 1933;

Also, the E. S. Wedertz note of February 21, 1933, for $1,794.00, which, according to the defendant's testimony, carries an unpaid balance of $1.00 principal, with interest on $1,794.00 at 8% per annum from February 21, 1933 to October 21, 1936;

Also, the P. M. Yparraguirre note of June 15, 1931, in the principal amount of $24,800.00, with interest at 8% per annum, and bearing certain endorsements.

On January 4, 1936, the defendant had been paid a total of $62,290.83 upon its claim (computed from figures shown on Tr. pp. 156-7), being $1,185.83 in excess of the amount due on February 16, 1932, when the Lyon County Bank closed. Subsequent payments were made to the receiver as follows:

On January 16, 1936, by Philatro & Jones	$ 100.00
On October 21, 1936, by E. S. Wedertz	1,928.07
On October 21, 1936, by H. E. Carter	1,523.00
On October 15, 1937, by E. S. Wedertz	1,095.00
On October 29, 1937, by H. E. Carter	873,05

The indebtedness to The Reno National Bank was incurred by the Lyon County Bank after July 1, 1931, except by way of interest which thereafter accrued to February 16, 1932, upon the $60,500.00 note bearing that date and also except in connection with the Simpson transaction of October 1, 1931, which is removed from consideration in the instant case.

ASSIGNMENTS VII AND XIV. (Tr. pp. 66, 67, 68.)

VII.

The court erred in finding and adjudging that interest computed on the indebtedness of Lyon County Bank to The Reno National Bank, as it stood on the day the Lyon County Bank became insolvent and was taken over by the State Bank Examiner to the knowledge of The Reno National Bank was not a "liability thereafter incurred" or that it was not such a liability respecting which Section 53 of the State Bank-

ing Act, approved March 22, 1911 (N. C. L. 1929, Sec. 702) provides among other things that

> "* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *"

XIV.

The court erred in refusing and failing to give effect to the provisions of Section 35 of the Banking Act of Nevada of 1911 being N. C. L. 1929, Sec. 664, and in finding and deciding and adjudging that to pay interest on the indebtedness of the Lyon County Bank to The Reno National Bank as it stood when the Lyon County Bank became insolvent and was taken over by the bank examiner, would not constitute giving a preference to a creditor, which is prohibited by law.

(1) The right of The Reno National Bank against the Lyon County Bank by reason of its contractual relations began July 1, 1931, and became converted into a right to have a claim against the assets of the Lyon County Bank as of February 16, 1932, the date the latter bank was closed by virtue of the banking laws and the state bank examiner took possession with notice to The Reno National Bank.

(2) Such claim, net, on and after February 16, 1932, was fixed and frozen in the sum of $60,148.64,

and no lawful charge for interest could be made or paid thereon because there was not found enough assets of the insolvent to pay all claims of all creditors and depositors with interest thereon.

(3) Sec. 53 of the State Banking Act (N. C. L. 1929, 702) provides that no interest shall be allowed after examiner takes possession of a state bank. This provision of the state law was a part of the original contract between the parties and effective at all times. Interest on the balance of the unpaid note stopped on February 16, 1932.

The Lyon County Bank was organized under the Nevada law and was a "creature of the banking act" of 1911 (N. C. L. 1929, 650).

Lyon County Bank v. Lyon County Bank, 60 Pac. (2d) 610.

The Nevada Banking Act of 1911, still in full force, effect and virtue on February 16, 1932, when the state bank examiner took charge of the Lyon County Bank, as insolvent, undoubtedly applies. The bank was organized under the Nevada law, under the provisions of the particular Act and these provisions relating to distribution of assets and the conduct of the bank were in force and effect throughout its operating life and at the date of its untimely closing. Attention is directed particularly to the following sections of the 1911 Act:

> Section 35 (N.C.L. 1929, 684). "No bank official shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security, or otherwise; provided, * * *"

Section 53 (N.C.L. 1929, 702) "* * * No bank, corporation, firm or individual knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *"

Section 72 (N.C.L. 1929, 721) "The powers, privileges, duties and restrictions conferred and imposed upon any corporation or individual, existing and doing business under the laws of this state are hereby abridged, enlarged or modified as each particular case may require, to conform to the provisions of this act, notwithstanding anything to the contrary in their respective articles of incorporation or charters. The legality of investments heretofore made, or of transactions heretofore had, pursuant to any provisions of law in force when such investments were made or transactions had, shall not be affected by the provisions of this act, except as the same can be done gradually by the sale or redemption of the securities so invested in, in such manner as to prevent loss or embarrassment in the business of such corporation or individual, or unnecessary loss or injury to the borrowers on such security; provided, all investments, transactions, loans, and requirements shall be made to conform to the provisions of this act, within the period of eighteen months from the time of the enactment thereof."

The Act of 1911, Sec. 35, forbids any bank official to give preference to anyone, in the manner specified, "or otherwise". The phrase "bank official" as used

may well include not only a bank officer of a going bank, but also any public official having to do with the administration of the banking law. A bank official may not by any device give to a creditor a preference, through a contract, waiver or otherwise, contrary to the banking act, which would result in an inequality and partiality of treatment as between that creditor and all other creditors, on insolvency.

Dellamonica v. Lyon Co. Bank M. Corp. (Nev.), 78 Pac. (2d) 89;

Crystal Bay Corp. v. Schmitt (Nev.), 81 Pac. (2d) 1070;

Crystal Bay Corp. v. Schmitt, on rehearing, (Nev.), 83 Pac. (2d) 464-467.

Section 53 denies to all creditors any "lien" or "charge" by reason of any payment, advance or clearance made "or liability thereafter incurred" against any of the assets of the bank whose property and business the bank examiner shall have taken possession. This denial dates from that taking. It draws the line between a creditor's rights while the bank is a going concern, and his rights when the bank is in custody of the law. It not only abolishes a charge or lien against a closed bank but it also abolishes "any liability thereafter incurred" against any of the assets of the bank. The language is the creditor shall not "have" a lien or charge for any payment or advance or for any "liability thereafter incurred". The plain meaning is that if any liability is "incurred" after notice of closing no charge shall be made and no lien shall attach against the assets of the closed bank.

Interest is a sum paid for the use of money. It is in the nature of damages for properly or improperly withholding a debt beyond the time when it ought to be paid. Men contract debts but they "incur" liabilities.

A charge or lien for a liability incurred for interest is incurred, accrues, or is brought on only by the lapse of time.

A charge or lien for a liability "incurred" for rent of realty is incurred or brought on only by the running of a certain number of days or months of use. The amount in either case is computed by considering the rate of hire and the lapsed time. The bar upon interest dropped when the bank was closed and the examiner took charge under the Banking Act. A stated amount of principal was then due and a certain amount for interest had accrued; additional interest thereafter would be a "liability thereafter incurred" and comes directly under the statutory inhibition.

Section 72 of the 1911 Act makes the Act apply notwithstanding any provisions in the charter of the bank. While this section may be difficult as to past transactions, it is carefully worded on that point. But as a rule of future guidance passed in 1911, before this bank was incorporated under its provisions and before the national bank made its contract with the Lyon County Bank, it is paramount. Any contract made by this debtor and creditor after March 21, 1911, would adopt and be bound by this Act in all respects. This is pointed out by Judge Ross in the *Washington-Alaska* case and that case went off on the point in the

majority opinion on the score that the regulation of the business of a Nevada bank doing business in Alaska was not the concern of the Nevada laws.

Notwithstanding the applicable and exclusive provisions of the Nevada Act of 1911 the creditor bank here made and claimed and makes and claims a charge and lien on the assets of this closed bank as for a liability for interest that confessedly was "incurred" after the bank closed. Any charge for the use of the money beyond that time must necessarily be measured, earned and brought on by the continued prolongation of the rental period. The statute denies the liability. It forbids the charge, withholds the lien.

THE NEVADA LAW IS FOUNDED ON THE POLICE POWER.

State v. Wildes, 37 Nev. 55.

"As often held by this and other courts, the banking business is so essential to the public welfare that laws may be passed for its regulation. Decisions holding that the state has no interest or power to appear after the appointment of a receiver in actions pending for the liquidation of insolvent banks were made in cases where there was no statutory provision similar to the one passed at the last session of the legislature authorizing the attorney-general to appear in the action after the appointment of a receiver, and in cases decided before the decisions of the Supreme Court of the United States upholding the bank guaranty laws in Oklahoma, Kansas, and Nebraska. (Noble State Bank v. Haskell, 219 U.S. 112, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L.R.A.n.s.

1062, Ann. Cas. 1912A, 487; Shallenberger v. First State Bank, 219 U.S. 116, 31 Sup. Ct. 189, 55 L. Ed. 177; Assaria State Bank v. Dolley, 219 U.S. 122, 31 Sup. Ct. 189, 55 L. Ed. 123.) In these decisions, overruling earlier ones of some of the intermediate federal and state courts, the Supreme Court of the United States held that the laws requiring all state banking institutions to contribute to a fund to be handled by a commission or under state authority, and to be applied to the payment of the claims of depositors in insolvent banks, were constitutional.

"The sustaining of these laws was in effect a holding that the state, under the police power, may continue to protect the depositors even after the bank has failed, instead of leaving him to hire his own attorneys and to be required to pursue his own methods to protect his interests. It being settled by the Supreme Court of the United States that the state may do this, it follows that the state has control of the banking business under the police power, and that it may authorize its attorney-general or other officer to protect the interests of depositors in defunct banks; and consequently, from the time of the passage of the act of March 24, 1913, the attorney-general was authorized, under the broad powers given him by that statute, to intervene or proceed in the action, whether it be considered for the protection of the depositors or for the benefit of the state."

(Paragraphs 5 and 6 of the opinion, Talbot, C. J.)

"The right of the state to exercise control and supervision in matters of this character cannot, in the light of modern thought and reasoning, be

questioned. When the legislature, speaking for the policy of the state, enacts laws which tend to protect the people in general, or great numbers of the people, when it seeks to enhance public welfare by enacting laws tending to safeguard and promote business and commercial conditions, the ultimate aim and object of such laws should not be lost sight of. Enacted and maintained by reason of the police powers of the state, such laws should be operated and construed to the end that their spirit might be applied, even though in letter they may appear limited or defective."

(Same case, page 68, concurring opinion, McCarren, J.)

CONTRACTS ARE MADE IN THE LIGHT OF EXISTING LAW AND POLICE POWER AND THE LAW BECOMES PART OF THE CONTRACTS.

Tonopah Sewer & Drainage Co. v. Nye Co., 50 Nev. 173.

See Opinion, pages 178-179.

"It then follows that the public service commission, in establishing the rate on the public buildings in question here, acted not only in accordance with the power vested under the acts creating it, but in accordance with the contract itself." (P. 179.)

See also:

Gill v. Paysee, 226 Pac. 302, 48 Nev. 12;

Pinney & Boyle Co. v. Los Angeles Gas & Elec. Co., 141 P. 620, Opinion, sec. 5, p. 622;

City of Woodburn v. Public Service Commission, 161 P. 391, Opinion, sec. 1, p. 393.

See also:

Const. Nevada, Art. VIII, sec. 1 (N.C.L. Sec. 131.)

THE NEVADA ACT OF 1911 IS INCLUSIVE OF THE WHOLE BANKING SUBJECT AND EXCLUSIVE OF ALL OTHER LAW, STATE OR FEDERAL.

Greva v. Rainey (Cal. App.), 33 P. (2d) 697.

"Bank Act is to be construed as being inclusive and exclusive of law applicable to bank in liquidation. (Gen. Laws 1931, Act 652.)

Syllabus 2.

"Bank Act covers entire field of law respecting insolvent banks, and therefore previous provisions of either common or statutory law in conflict therewith is no longer operative. (Gen. Laws 1931, Act. 652.)

Syllabus 4.

"Statutory procedure for liquidation of bank must be followed. (Gen. Laws 1931, Act 652, §136, par. 2; §136a.)

Syllabus 5.

"Where that rule obtains it is manifest that the liquidating officer is an administrative government officer of the federal government, or of the state government under which he was appointed, and that his powers and duties are those prescribed in the bank statute and not otherwise. Port Newark Nat. Bank of Newark v. Waldron (C.C.A.) 46 F. (2d) 296."

Opinion, page 699.

See companion case of:

Wood et al. v. Rainey, Supt. of Banks, 33 P. (2d) 702 (Cal. App.).

"Liquidating agent of bank *held* not entitled to pay claimants interest after date Superintendent of Banks took charge, but claimants when paid full amount due on such date were 'paid in full' within Bank Act. (Gen. Laws 1931, Act 652, §136.)"

Syllabus 1.

See on hearing in Supreme Court:

Greva v. Rainey, Wood et al. v. same, 41 P. (2d) 328.

"Bank Act being silent as to interest, depositors in commercial department *held* not entitled to recover interest during liquidation of bank before payment of claims of depositors in savings department, since all creditors of insolvent debtor should be treated equally, unless statute provides otherwise. (St. 1909, p. 93, §26; St. 1913, pp. 150, 151, §§24, 27; St. 1921, p. 1370, §23.)

Syllabus 3.

"The decisions, including those hereinabove cited, are uniform to the effect that in so far as is possible the creditors of an insolvent debtor must be treated on a basis of equality. See, also, White v. Knox, 111 U.S. 784, 4 S. Ct. 686, 28 L. Ed. 603; Thomas v. Western Car Co., 149 U.S. 95, 116, 117, 13 S. Ct. 824, 37 L. Ed. 663. That, indeed, is the premise from which springs the rule that interest ordinarily will not be computed nor paid from the date of the suspension of business, or commencement of the receivership or other liquida-

tion procedure. Therefore, there being but one debtor involved, all creditors are entitled to equal consideration except where the statute expressly provides otherwise, and then only to the extent provided. It follows that the fact that section 27 required the assets of each department to be held solely for the 'repayment of the depositors' of that department is not to be held to enlarge the rights of such depositors so as to include interest when the act is silent on the matter and otherwise interest would not be recoverable. The reasoning to be applied when the question is one of interest as between creditors is stated in People v. American Loan & Trust Co., supra, viz.: 'Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets.' ''

Opinion, pages 331, 332.

Cited:

Ledford v. Skinner (June, 1937), 156 Oregon 656, 69 Pac. (2d) 519.

We cite also: *In re Frasch,* 31 P. 755 (Wash.), following the state law respecting insolvencies, to the disregard of the national bank act and the national bankruptcy act.

First National Bank of Seattle v. Mansfield State Bank (Wash.), 221 P. 595, reaffirming the decision in *In re Frasch,* 31 P. 755.

Beaver County v. Home Indemnity Co., 52 P. (2d) 435-458:

"Ruling that county was general creditor as against assets of closed bank to extent of prin-

cipal indebtedness when bank closed together with accrued interest *held* error, since interest does not run after declared insolvency unless there are sufficient funds on hand to pay all of the demands and accrued interest."

Syllabus 36.

First Wisconsin Nat. Bank of Milwaukee v. Kingston, Commr. of Banking, 252 N.W. 153 (Wis.), 94 ALR 465-468:

"It is conceded that the enactment of chapter 477, Laws 1933, making applicable to bank liquidations the bankruptcy rule, came too late to affect this case. It is suggested by defendant that the enactment of this chapter indicates the view of the banking department and of the Legislature that the bankruptcy rule is the equitable and fair rule. However, the Legislature has not seen fit to modify the equity rule until the enactment in question, and then has modified it only in so far as bank liquidations are concerned."

Opinion at 94 A.L.R. 468.

(The court rejects the Wisconsin statute only because it was not passed in time. In Nevada the legislature has "seen fit" in 1911 to enact a law and it is exclusive.)

Instances where the state courts in cases involving a state debtor, not a national bank and not a bankrupt, have construed the state laws in their search for an equality of treatment to creditors, are cited below:

Broadway-Main St. Bridge Dist. v. Taylor (Ark.), 57 SW (2d) 1041;

Louisville v. Fidelity & Columbia Tr. Co. (Kentucky), 54 SW (2d) 40;
Re Victor (New York), 166 N.Y. Supp. 1012.
See notes 94 A.L.R. pp. 473-474.

"The Bank Act, chapter 8 of the Revised Code of 1928 (sections 209-272), under which proceedings for the liquidation of insolvent banks are authorized, gives us no key to the solution of the question."

Re Prescott State Bank's Estate, Simms, State Treasurer v. Button, etc. (Ariz.), 3 P. (2d) 788 at 790.

(The court first searched for a state law applicable.)

U. S. Fidelity & Guaranty Co. v. Malia Bank Commissioner, 49 P. (2d) 954 (Utah).

The court in this case construed the Utah bank act and came to the conclusion that a secured creditor must surrender or account for the value of his collaterals at the time of insolvency, apply the avails on the claim as fixed on closing, without added interest, and then might receive dividends on the balance remaining unpaid on the original claim.

The court declared its duty to "give effect to whatever legislative intent may be found expressed in our statutes". It cited R. S. Utah 1923, c. 2, tit. 7, including sections 7-2-15. "No preferences or priorities shall be given to any claim;" 7-2-16 shall "declare one or more ratable dividends".

"The clear import of these sections is to fix equality in the treatment of claims and in the declaration of dividends thereon. In no other way could ratable dividends be declared, there being no exception provided for."

49 P. (2d) at 956, col. 2.

In *State v. State Bank of Alamogordo,* 32 P. (2d) 1017 (N. Mex.), the court sought the ruling law, Comp. Stat. 1929, Secs. 32-194, holding however:

"The courts of these states mention the fact that there is nothing in their banking acts or insolvency statutes controlling the matter. So it is with us. Our general corporation insolvency act directs a ratable distribution of the assets of the insolvent, although recognizing the superiority of prior liens. Comp. St. 1929, §§32-194. Substantially the same provision in the National Banking Act was involved in the decision of the Merrill Case adopting the equity rule."

32 P. (2d) 1019, col. 2.

The court then construed the general corporation insolvency act of New Mexico in the absence of a provision in the banking law of that state, and reasoned from decisions in national bank cases because the National Bank Act was similar to the state corporation act. Had there been a banking act like the Nevada act of 1911 denying a charge or lien by reason of any liability incurred after the insolvency, the task would have been simplified.

The New Mexico court was urged to decide the case on the basis of New Jersey decisions inasmuch as the Corporation Insolvency Act adopted by the territorial

legislature in 1905 was taken from New Jersey. But the court declined to do so for the reasons that the decisions relied on were made after New Mexico adopted the New Jersey act.

Commerce Trust Co. v. Farmers Exchange Bank, 61 SW (2d) 928 (Mo.); 89 A.L.R. 379, sec. 3.

"Statute relating to department of finance and banking institutions provides exclusive scheme for liquidation of insolvent banks. (Rev. Stats. 1929, Secs. 5333, 5337, 5339, 5340.)"

Syllabus 3-61 SW (2d) 928.

Citing also:

Bowerstodk Mills, etc. Co. v. Citizens Trust Company, 298 S.W. 1049 (Mo.), to effect that the banking statute (R.S. 1919, 11716 etc.) is an exercise of the police power.

In the above *Commerce Trust Company* case it was held that, despite all other statutes, it was fatal to present claims too late when the bank act prescribed the time within which they must be filed.

City of Louisville v. Fidelity and Columbia Trust Co., et al., 54 SW (2d) 40 (Ky.), cited before,

also holds that statutes authorizing banks and trust companies to pledge assets to receive public deposits, held not to permit agreement contrary to the statutory rule of distribution. (Ky. St. Sec. 165-a-17 and Sec. 579 as amended by acts 1932, c. 13.) In that case the court worked out the rule, under the statute, to its own satisfaction, although reasoning by analogy to

cases under the federal bankruptcy laws. (That case strikes at a contract, designed to adopt a rule of distribution in case of after occurring insolvency, in the face of a statute forbidding the plan of distribution agreed on, or purporting to be agreed on.)

ASSIGNMENT X. (Tr. p. 67.)

The court erred in finding and adjudging that the said collateral-security agreements of July 22, 1931, were given to secure or did or do secure the payment of any interest on the indebtedness of Lyon County Bank as it stood when said bank became insolvent and was taken over, as aforesaid, computed from any period after the said day of insolvency, taking over with knowledge as aforesaid.

It is important to observe that under the provisions of Exhibits B, C and D attached to the complaint (Transcript, pp. 16-21) the assets therein described were pledged by the Lyon County Bank "as collateral security for the payment of all of our present indebtedness to The Reno National Bank, of Reno, and all of the future indebtedness to said bank which we may incur hereafter from any cause or upon any consideration".

The assets in question, therefore, were pledged not specifically for the payment of the promissory note of July 1, 1931, but

(a) For the payment of the indebtedness of the Lyon County Bank to The Reno National Bank as of July 22, 1931; and

(b) For the payment of the future indebtedness of the Lyon County Bank to The Reno National Bank incurred after July 22, 1931.

It is our position that the rights of the defendant with respect to the securities are limited to the express provision of the collateral agreements of July 22, 1931, and if interest thereafter accruing is *not* to be considered as indebtedness thereafter incurred, then under the contract of the parties the described assets were not pledged for the payment of interest after July 22, 1931.

If, on the other hand, interest accruing after July 22, 1931, *is* to be considered as indebtedness thereafter incurred, then the statute bars the assertion of a lien for interest accruing after February 16, 1932, the date of the insolvency of the Lyon County Bank.

It would seem clear that the parties, in making their contract on July 22, 1931, considered that accruing interest would constitute an indebtedness thereafter incurred, as otherwise the collateral agreements would have provided no security whatever for future interest; and where contracting parties act within their legal rights the construction placed or intended by them upon expressions used in the contract should be given full consideration by the court in construing the same.

Counsel for the defendant has at all times conceded that this case is governed by the laws of the State of Nevada. The sections of the Nevada statute above quoted read in conjunction with the col-

lateral agreements are, in our judgment, absolutely conclusive of the issues of this case.

To repeat: The statute provides that no one "knowing of such taking possession by the examiner shall have a lien or charge for any * * * *liability thereafter incurred* against *any* of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid". (Italics ours.)

The agreements of July 22, 1931, provided that the notes and other assets were deposited with The Reno National Bank "as collateral security for the payment of all of our *present indebtedness* to The Reno National Bank, of Reno, and all of the *future indebtedness* to said bank, which we may *incur* hereafter". (Italics ours.)

It of course will not be seriously contended that the term "present indebtedness" as used in the collateral agreements would embrace all interest which might at any time in the future accrue due to the failure to pay the principal, or that this term would include *any* interest not already earned on July 22, 1931. It would of course be impossible for anybody to compute the amount of his "present indebtedness" at any time if interest thereafter to accrue on interest-bearing obligations should have to be included, for the reason that no one can foresee with certainty when such obligations will be paid nor for that reason can foretell how much interest may accrue in the meantime.

This point is illustrated in the *Montana* case of *Carlson v. City of Helena,* 102 Pac. 39, involving a construction of the constitutional provision regard-

ing the limitation of municipal indebtedness, wherein the court said:

"Much contention is made over the question whether the interest, as well as the principal, of the proposed issue of bonds should be taken into account in determining whether an indebtedness will be created thereby in excess of the 10 per cent limit authorized by the statute. If the interest should be taken into account and the amount of it be added to the $670,000. of principal, as counsel contend, the sum would exceed 10 per cent of the assessed valuation for 1907—the basis upon which it must be estimated—by several thousand dollars. The whole of the issue would then be void. This contention proceeds upon the theory that, when interest is expressly reserved in the contract, it becomes a part of the debt, and hence, in determining the amount of indebtedness which a city may contract by the issuance of bonds, the interest up to the date of maturity must be added to the principal. It is true that the reservation of interest is as much a part of the contract as the main promise (State Savings Bank v. Barrett, 25 Mont. 112, 63 Pac. 1030), yet no authority has been called to our attention which furnishes support for the rule contended for. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned. If this is not the correct rule, then, as observed by the Supreme Court of Wisconsin in Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681, 'most of the cases in the books relating to the ascertainment of

municipal indebtedness have been wrongly decided'. The subject has frequently been considered by the courts of last resort in states having constitutional and statutory provisions similar to ours, supra, and the conclusion reached has been almost invariably against the contention here made. Herman v. City of Oconto, supra; Finlayson v. Vaughn, 54 Minn. 331, 56 N. W. 49; Kelley v. Cole, 63 Kan. 385, 65 Pac. 672; Blanchard v. Village of Benton, 109 Ill. App. 569; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441; Gibbons v. Mobile & Great Northern R. Co., 36 Ala. 410; Jones v. Hurlburt, 13 Neb. 125, 13 N. W. 5; Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803; Durant v. Iowa County, 8 Fed. Cas. 117. See, also, 2 Abbott. Mun. Corp. Par. 160. All of these cases rest upon the principle that the authority granted by the Constitution or statute, as the case may be, to contract a debt, refers to the amount of the debt at the date at which it is created, and has no reference to the amounts of interest which accrue thereafter, and thus construe the fundamental law according to the sense in which the terms 'debt' and 'obligation' are used in the language of the common people."

Carlson v. City of Helena, 102 Pac. 39, at 44.

The rule is further set forth in Corpus Juris, as follows:

"The most common form of constitutional limitation of municipal indebtedness is that a municipal corporation shall not become indebted, or be allowed to become indebted, to an amount, including existing indebtedness, in the aggregate exceeding a specified percentage of the value of

> the taxable property therein * * * Accrued, but not unaccrued interest on obligations of a municipality is to be included in computing its indebtedness at a particular time."
>
> 44 C. J. 1121-24.

The question whether interest is a part of a debt, born with it, and when the liability to pay it is "incurred" receives illuminating treatment in the Nevada case of *State of Nevada v. Parkinson,* 5 Nevada Reports, pp. 17-27.

In that case the act of the legislature of 1869 creating a legislative fund was declared constitutional and it was specifically found that it did not violate the constitutional provision against contracting a public debt exceeding three hundred thousand dollars. The court held that the act in question did not "create" a debt.

Specifically the court held that the state tax anticipation warrants provided for, bearing interest at the rate of fifteen per cent per annum contemplated payments for governmental services and would create no debt and that the provisions for interest on them would not alter the situation, holding: "Interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

As to the pertinent point in the instant case, the court says:

> "Defendant, however, contends that a different rule obtains when interest is allowed on warrants. If it be true that the issuance of a warrant creates no debt, and that no debt, within the pur-

view of the constitution, pre-existed, as would follow from the reasoning of the cases previously cited, how can the addition of interest make that an unconstitutional debt which was not so before? Interest constitutes no part of the original demand; it is simply a statutory allowance for delay. If the money be in the treasury, then no interest accrues; if not, the party holding the warrant is compensated for waiting until there is. It may be said that the allowance of interest presupposes a debt, for that there can be no interest except upon some principal; but upon the theory of the cases cited there is a debt, but not a debt repugnant to the constitution, as it is only contingent—a debt existent, but payable only upon the collection of revenues. In this view, as the interest follows the principal, that being contingent, so the interest. * * *"

State of Nevada v. Parkinson, 5 Nev. 17 (pages 27-28).

ASSIGNMENTS IV, V, VI. (Tr. pp. 64-65.)

IV.

The court erred in failing and refusing to find and adjudge that no interest on the indebtedness of Lyon County Bank to The Reno National Bank was payable, or could be charged or collected by The Reno National Bank, and that The Reno National Bank had no lien for any such charge, at any time, or for any period, after Lyon County Bank became insolvent and was taken over by the state bank examiner and The Reno National Bank had notice thereof.

V.

The court erred in finding and adjudging that after Lyon County Bank became insolvent and was taken over by the state bank examiner and The Reno National Bank had notice thereof, The Reno National Bank had the right to apply the avails from the collaterals deposited with it, to the discharge of any alleged interest computed over such subsequent period upon the amount of the indebtedness of Lyon County Bank as of the day the Lyon County Bank became insolvent and was taken over by the bank examiner and The Reno National Bank had notice thereof.

VI.

The court erred in finding and adjudging that it appeared from the exhibits in evidence, or was true, that after the defendant credited avails from collaterals mainly upon the principal of the note or indebtedness of Lyon County Bank that the balance due on the principal was one dollar ($1) and the balance due on the interest was $7698.52, both as of October 21, 1936; and the court erred in finding and adjudging that following the receipt of a letter of date December 16, 1936, from the Executive Assistant Counsel of the Comptroller of the Currency, the defendant made a revision of said previous endorsements "resulting in a balance due on principal as of October 21, 1936, of $9316.94", whereas in fact and in law said revision was not in conformity with said letter and said revision was not legal or proper and was incompetent to change the amount lawfully due by said

Lyon County Bank to The Reno National Bank on October 21, 1936, or fix it in the sum of $9316.94 or other sum, except as alleged in the complaint.

While we are admittedly governed in the instant case by the laws of the State of Nevada and not by the national laws, it is interesting to notice briefly the development of the rule concerning the payment of interest on secured claims in cases involving insolvent national banks. In *U. S. v. Knox,* 111 U. S. 784, 28 L. Ed. 603, Chief Justice Waite said in refusing to allow interest on a secured claim:

> "The business of the bank must stop when insolvency is declared. Rev. Stat. Sec. 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown * * * to have had their origin in something done before the insolvency. It is clearly his duty therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

It will be observed that Chief Justice Waite classed interest accruing after the insolvency as a "new debt" and not to have had its "origin in something done before the insolvency". Certainly Justice Waite considered accruing interest as an "indebtedness thereafter incurred".

In *Merrill v. Nat'l Bank of Jacksonville,* 173 U.S. 131, 43 L.Ed. 640, the Supreme Court said:

> "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not.

When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material."

Irrespective of statutes it is the universal general rule that in cases of bank insolvency the claim or debt can not be increased by interest after the date of closing, unless all can share likewise. So called "exceptions" to this rule will be found to be founded on statutes such as relating to trust funds, preferences properly allowed or dividends, improperly withheld or delayed and need not be considered in stating the general rule.

Fletcher Cyc. of Corporations (Permanent Edition), Vol. 16, Sec. 7937, p. 627 et seq.

"Interest on claims.

"As a general rule, after the property of a corporation has passed into the hands of a receiver, interest is not allowed on claims against the funds held by the receiver."

"As a general rule, under the various insolvency acts, state and federal, interest is not allowed on claims." (Page 628.) (Citing Thomas v. Western Car Co., 149 U.S. 95. Quoted in Samuels v. E. F. Drew & Co., 292 Fed. 734-736.)

"The reason for the general rule is that since the assets are almost invariably insufficient to pay the debts, calculations of interest are a waste of time." (Citing in notes to point that interest is allowed up to but not after the appointment of a receiver, First State Bank of Eastland v. Phelps (Tex. Civ. Ap.) 67 SW (2d) 900.

Citing in the notes in the supplement to page 628 Butts v. Gaylord State Bank, 282 N.Y. Suppl. 1, 5. Greva v. Rainey (previously cited here) 33 P(2d) 697. Calif.

"* * * interest will be allowed on secured debts if in conformity with the agreement under which security was taken." Page 632. (Citing Gamble v. Wimberly, 44 Fed. (2d) 329.)

Compare: Illegal agreement, City of Louisville v. Fidelity & C. Trust Co., 54 SW (2d) 40, cited herein before.

"* * * if interest has been prepaid by the insolvent corporation for any period subsequent to such appointment, such prepaid interest will be deducted from the amount of the claim as proved." Page 633. (Citing the author of Clark on Receivers article in 29 Yale L.J. 496.)

"Even though a creditor secured by a collateral may prove his claim for the full amount thereof without in any way taking into account such collateral, he cannot apply collections from collateral security which he holds to the liquidation of interest accruing upon his claim subsequent to the bank's insolvency, before applying such collections to the reduction of the principal of his claim." Page 634, note 54 citing Gamble v. Wimberly, 44 Fed. (2d) 329, paragraph 7.

Michie on Banks, Vol. III, page 216, Sec. 158, et seq.

"A preference can only arise by reason of some statutory provision or some fixed principle of common law which creates a special, superior right in certain creditors over others." Page 223, Sec. 163.

(See Commerce Trust Co. v. Farmers Exchange Bank 61 SW (2d) 928, to effect that the Missouri statute is exclusive.)

(See Louisville v. Fidelity etc. Co., 54 SW (2d) 40 (Ky.) as stating the statutory rule in Kentucky.)

(See Leach v. Sanborn State Bank, 231 NW 497 (Iowa) 69 A.L.R. 1206, involving a claim for interest which was denied.)

The Leach v. Sanborn case was governed by Sec. 9239, Code of 1927, which provides that the net assets of an insolvent bank "shall be ratably distributed among the creditors thereof, giving preference in payment to depositors".

"Receivership proceedings and priorities in the distribution of assets are governed by the statute in force when the receiver is appointed." Page 224, Sec. 163. (Citing Dickinson County v. Leach, 211 NW 542 (Iowa); Taylor v. Diercks, 39 SW (2d) 724. Statute.

"As against the assets of an insolvent bank, generally interest on a claim is calculated only to date of the suspension and vesting of the title of the assets in the receiver, unless there are surplus assets after paying the indebtedness. As between the creditors themselves, some cases hold that no interest is allowed upon their respective claims, whether preferred or unpreferred, after the appointment of a receiver." III Michie, Sec. 219, p. 329. Citing New York Security etc. Co. v. Lombard Invest. Co., 73 Federal 537, giving reason that otherwise creditors could profit by their own delay in making claims.

7 Corpus Juris 750, sec. 545.

As against bank, interest on claims is allowed from date of appointment of receiver or trustee. As between creditors, interest cannot be allowed so as to change their distributive rights. 7 C.J. 744, Sec. 532. Citing L. Nelson v. John B. Colegrove & Co. State Bank, 272 Ill. App. 258.

"The general principle of equity that the assets of an insolvent are to be distributed ratably among his general creditors, applies with full force to the distribution of the assets of an insolvent state bank." 3 R.C.L. 642, Sec. 272. "Banks".

In *Gamble v. Wimberly,* 44 Fed. (2d) 329, the court followed and emphasized the principle stated in the *Merrill* case (173 U. S. 131) but introduced a qualification in those cases where interest or dividends had been earned upon the collateral since the date of the debtor bank's insolvency and had been collected by the pledgee, in which case the pledgee was to be allowed to retain such collections and apply the same against the interest accumulated on the main obligation, to the extent that the interest so collected on the collateral did not exceed the interest accrued on the main obligation.

The foregoing decisions were based upon the provision of the National Bank Act to the effect that "ratable dividends" should be paid by the receiver out of the liquidated assets of the bank, and all of the federal decisions for many years followed the rule enunciated in *U. S. v. Knox* or as qualified in *Gamble v. Wimberly,* see:

(March, 1937) *Fash v. First National Bank of Alva, Okla.* (C. C. A. 10th), 89 Fed. (2d)

In 1918 subdivision (k) of Section 11 of the Federal Reserve Act was amended (Title 12 U. S. C. A. Sec. 248 (k)) by the act of September 26, 1918 (c. 177 Sec. 2, 40 Stats. 968), but this amendment was not construed by the supreme court for nearly twenty years or until the filing of the recent decision in the case of *Ticonic National Bank, Peoples-Ticonic National Bank, et al., Petitioners, v. Lottie F. Sprague and Margaret Davis Sprague,* 303 U. S. 362, 82 L. Ed. 630, wherein it was held that under the specific provisions of the statute as amended, the owners of funds held in trust for investment by national banks, have a lien upon the bonds or other securities, to their claim, for principal and interest accruing.

The *Sprague* decision, of course, has no bearing upon the instant case, but is limited to a construction of the 1918 amendment of subdivision (k) of Sec. 11 of the Federal Reserve Act. It relates to national banks acting as trustees and the character, extent and attributes of the lien that the owners of funds held for investment shall have in the event of failure of such bank, on the bonds or other securities for the protection of the funds so held in trust.

This amendment rests on a narrow ground and the decision notes an exception only to R. S. 5236 (Title 12 U. S. C. A. Sec. 194) concerning "ratable" distribution, finding no discrimination against other creditors.

The Comptroller of the Currency, in his letter of instructions to the defendant receiver, dated December 16, 1936 (Tr. pp. 162-6), contended that the defendant was entitled to retain interest earned on the

collateral following the insolvency and collected by the defendant, under the rule laid down in *Gamble v. Wimberly,* supra, and, while he did not instruct the defendant to alter the endorsements or applications theretofore made on the original paper, he requested that he be furnished with a statement reflecting the transaction under the rules enunciated in the *Gamble* case. Had the defendant followed such instructions, he would have found that the amount of interest earned after insolvency and collected by him and his predecessor bank would have amounted to $2,930.75, as shown by the court's finding No. IV. (Tr. pp. 57-8.) There can be no question as to the correctness of this amount, as it is based wholly upon the defendant's own testimony. (Tr. pp. 79-90.)

What procedure the defendant actually did follow in making his so-called "revision" and in reapplying the payments theretofore received as against either the subcollateral or the main obligation we are unable to fathom, and no intelligible explanation was offered by the defendant. However, as heretofore stated, his "revision" increased the amount of interest claimed to have been earned subsequent to insolvency and collected by him to the sum of $23,118.97 (Tr. p. 39), out of which he apparently pretended to reimburse himself in full for the amount of interest on the main obligation which he claims would have resulted had he applied the $23,118.97 as interest on the subcollateral, namely, $14,658.84, and leaving only a balance of something less than $9,000.00 of this $23,118.97 to apply toward the reduction of the principal. This of course is ridiculous.

The trial court was apparently somewhat confused by the whole proceeding, judging from its decision and from the findings which it ultimately signed, but it apparently ratified the so-called revision and re-allocation made by the defendant without giving serious consideration to (1) the method of original application; (2) the manner by which the various sums were collected; (3) the instructions given by the maker of the collateral and acquiesced in by the defendant; (4) the effect of such "revision" as between the defendant, the plaintiff and the makers of the various notes; (5) the instructions of the Comptroller of the Currency dated December 16, 1936; or (6) his legal right to make such re-application.

The trial court apparently attached much importance to the defendant's claimed "admission" of the collection of $14,658.84 in the form of interest on the pledged securities. (Tr. p. 42.)

At the trial, we selected one item at random and the testimony of the defendant (Tr. pp. 108-10) shows that, in the case of the H. E. Carter transaction, the original application of previous payments left a balance due on the Carter note on October 29, 1937, amounting to $873.05; that on that date he accepted from Mr. Carter the sum of $873.05 and surrendered his note to him; but that, according to his "revision", the balance which Mr. Carter would owe on October 29, 1937, would be $1,625.99 plus one year's interest on that amount at 8% per annum, or something over $1750.00 in all; that, after deducting the payment of $873.05 made by Mr. Carter on October 29, 1937,

there would still be a balance of approximately $875.00 owing on this collateral; that this approximate sum of $875.00 is included in the balance of $9,316.94 which the defendant claims is still due on the $60,500.00 promissory note; but that he is unable to turn over to the plaintiff the collateral of Mr. Carter showing a balance still owing of approximately $875.00 because he surrendered the same to Mr. Carter for some $873.05 at a time when he now claims the amount owing by Carter was in excess of $1,750.00.

Aside from the question of the legal right of the defendant to make a reapplication of these payments, which will be discussed shortly, the Carter transaction illustrates the absurdity of so doing and the extreme inequity which would result therefrom. The same analysis could be made of the other items, but the one brought into the open at the trial will serve to discredit the whole "revision" proceeding.

One who takes security assumes a trust. His rights extend to protecting himself. In so doing he must not liquidate any more of the security paper than necessary and he must not put it beyond the power of his debtor to realize on any of the security paper after the pledge has fulfilled its function. He is held to an accounting.

ASSIGNMENTS XI AND XIII. (Tr. pp. 67-68.)

XI.

The court erred in failing and refusing to find and adjudge that the so-called revision of credits and endorsements on the note of Lyon County Bank was illegal, improper and inadmissible and without the consent or authority of Lyon County Bank and was made to the detriment of Lyon County Bank and defendant was and is estopped to make or rely on any such so-called revisions.

XIII.

The court erred in failing to find or adjudge on the material issue, drawn in issue, respecting the legality of and warrant or lack thereof, for the so-called recasting and revising and reallocation of credits on the collaterals and on the primary obligation in accounting for the avails from the said collaterals, or the sufficiency of said accounting.

In this case, without conceding the accuracy of the tabulated record, the accounting and attempted reaccounting will not bear scrutiny. The purported reallocation of credits on the primary obligation, involving a new and substituted record of endorsements on the Lyon County Bank's pledged security paper and even involving the cancellation and surrender of paper belonging in equity to the Lyon County Bank, contrary to the contemporaneous history of the transactions themselves, is contrary to law.

Applications of payments, once made, cannot be changed except by mutual consent of the parties.

Palm v. Johnson (Tex. Civ. App.), 255 S. W. 1007;

Wait v. Homestead Bldg. & Loan Assn., 95 S. E. 203, 81 W. Va. 702.

Silence is not acquiescence.

Maxwell v. Providence Mut. L. Ins. Co. (Wash.), 41 Pac. (2d) 149.

"The creditor's right to make the appropriation applies only where the debtor has had an opportunity of exercising his right; and if payments are made on his account by a third person, or in such a way as to impede his right, the rule does not apply."

21 *R. C. L.,* p. 91, note 10.

"While a creditor is not obliged to make an appropriation immediately the payment is made, still where he does appropriate the payment in a particular way he is bound by his act and cannot afterwards change the application without the consent of the debtor, for the law regards the rights of the parties as becoming fixed at the time the application is so lawfully made in so far as the original debtor and creditor alone are concerned."

21 *R. C. L.,* p. 93, Sec. 97, notes 5, 6, 7 (citing cases).

One of the cases cited says:

"As the tree falls, so shall it lie".

U. S. v. Brent, 236 Fed. at 774.

See allied question on the right of a surety to have payments properly credited.

Wheeler & Stoddard v. Portland L. Co., 51 Nev. 53, 268 Pac. 46. Brief p. 61.

As to payments by debtors on the rights of guarantors:

"An application once made by the debtor or creditor to the debt for which the surety or guarantor is bound discharges the latter pro tanto, and he cannot be affected by a change of application by the creditor and principal debtor."

21 *A. L. R.* 712 (citing *inter alia*).

U. S. For Use of Jackson Ornamental Iron & Bronze Works v. Brent, 236 Fed. 771:

"Where a debtor makes a payment to a creditor to whom he owes two separate accounts, without directing its application, he thereby consents that the creditor may apply it to either account; and, when it is applied to one, a surety for such account is at once discharged from liability pro tanto, whether he has notice of the payment or not, and the credit cannot thereafter be transferred without his consent, although his principal and the creditor agree to the transfer." Syllabus 1.

Opinion in above, p. 774.

See:

96 *Am. St. Repts.* p. 75.

Note on change of application.

"Where a payment has been absolutely applied, it is irrevocable and cannot be changed: McMaster v. Merrick, 41 Mich. 505, 2 NW 895; Grasser etc. Co. v. Rogers, 112 Mich. 112; 67 A.S.R. 389, 70 NW 445, citing Chapman v. Commonwealth, 25 Gratt. (Va.) 721. The mere writing of an endorsement on the back of a note, without knowledge thereof by the maker, is not,

however, an irrevocable application of the money so endorsed, where there are other debts, Lau v. Blomberg (Ia.), 91 NW 206. The creditor, having made the application, cannot by his own act alone, change it: Wendt v. Ross, 33 Cal. 650; White v. Costigan (Cal.), 72 Pac. 178; Jackson v. Bailey, 12 Ill. 159; Hahn v. Geiger, 96 Ill. App. 104; Martin v. Draher, 5 Watts (Pa.) 544; Black v. Shooler, 2 McCord (S. Car.) 293; Eyler v. Read, 60 Tex. 387; Kinnear v. Dilley, 3 Wills Civ. Cas. Ct. App. (Tex.) Sec. 406; Chapman v. Commonwealth, 25 Gratt. 721; The Asiatic Prince, 108 Fed. 287 (CCA)."

From 96 *A. S. R.* 75.

"Where a creditor has applied a payment to a particular indebtedness and notified the debtor, who acquiesces therein, the application becomes a finality, and the creditor cannot thereafter change it without the debtor's consent."

Syllabus 1 from *The Asiatic Prince,* 108 Fed. 287 (C. C. A. 2d).

Looking at the matter realistically in the light of what was done or should have been done, we are required to ascertain the fact and the law rather than to inquire as to what the contesting litigants may say by means of an "account stated" as to what was done. Both of the two records here are subject to analysis as to mutual inconsistencies and as to the evidence of what actually took place.

It has been held that a court may vary the application of payments in the "interests of justice".

Carson v. Federal Reserve Bank of New York, 172 N. E. 475 (citing 62 L. Ed. 326).

It has been held that "Equity may require payments to be properly credited".

Whitehead v. Wicker, 280 S. W. 604 (Tex.).

The trial court, after announcing in its opinion the points presented for decision, evidently attempted to decide the issues presented, but we feel that it erred in two respects:

First, it stated (Tr. p. 46) that the complainant's contention under Sec. 53 of the Nevada Banking Act "is without merit as will hereafter appear". There is nothing further in the opinion which would make it appear that this contention was without merit. The Washington-Alaska Bank case certainly did not attempt to construe this section, as it had not even been enacted at the time the case was decided. In the case of *Douglas v. Thurston County,* the court merely held that that case must be decided under the laws governing the insolvency of national banks whereas the national bank laws were not applicable in the *Washington-Alaska Bank* case. The *Gamble v. Wimberly* case most assuredly does not seek to construe the Nevada Banking Act or any similar act. The *Ticonic National Bank* case was by its express terms based exclusively upon the language of the amended Federal Reserve Act. In the *Organ v. Winnemucca* case the question of interest was never even mentioned and, as the court expressly stated, the only matter submitted for consideration and decision was the question of law as to the validity of the pledge. The citations from 9 C. J. S. do not anywhere touch upon the question of the allowance or disallowance

of interest. We feel, therefore, that the court has cited no authority whatever to sustain its statement and that its contention in this respect is without merit.

Second, having decided, however, that the defendant might retain as interest upon the main obligation the income earned by the collateral after the date of insolvency and collected by The Reno National Bank and its receiver, we respectfully submit that the trial court did not give serious or any consideration to the testimony presented as to the amount of such income so earned and collected. It is true the court made its finding (Tr. pp. 57-8) that this amount was $2,930.75, but it immediately proceeded to disregard this specific finding and adopt and base its judgment upon all of the wild juggling of figures employed by the defendant receiver in making the latter's wholly illegal and wrongful revision and reapplication.

It all seems to have been very confusing both to the trial court and to defendant's counsel. For instance, in the proposed findings which the latter presented to the court he recites that "the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank". (Tr. p. 50.) The trial court uses the same figure both in its decision and in its signed findings. (Tr. pp. 42 and 58.) Yet the amount shown as representing this item in the exhibit (Tr. p. 39) is $23,118.97 and this is the amount used by Mr. Butler, the defendant's bookkeeper, in his testimony. (Tr. p. 112.) Mr. Butler further testified

(Tr. p. 113) that the figure of $14,658.84 is not the correct amount of interest accrued and collected and applied on the main obligation. He added, "It is, under our revised set-up. That is what we want to do now".

Mr. Butler's further testimony (Tr. p. 113) is also illuminating to the effect that

> "I never made a compilation, split as to the date February 16, 1932 (date of suspension of Lyon County Bank) as to the interest actually accruing on this underlying security after the Lyon County Bank closed February 16, 1932,— or as to interest which accrued after that date and was collected after that date by Mr. Tobin."

Yet in the face of this testimony, and in the face of Mr. Tobin's testimony (Tr. pp. 79-90; Exhibit 2, Tr. pp. 159-160) showing that $2,930.75 was the total sum of interest which accrued on the subcollateral after the date of the Lyon County Bank's insolvency and which was collected by the defendant, and in the face of the court's specific finding IV (Tr. pp. 57-58) that this figure was correct, the court permitted the substitution of $14,658.84 to represent the amount of such interest so accrued and collected (Finding V, Tr. p. 58) and decided the case accordingly.

It is for reasons such as these that we are convinced that the merits of the respective parties, both with respect to the law applicable and as concerns a proper determination of the facts, have not received the consideration from the trial court which the cause merits and to which the parties were entitled.

On page 21 of this brief we have shown the amount for which the defendant should account to the plaintiff under the theory that the defendant's claim would draw no interest, as is our contention under Sec. 53 of the Banking Act. If, however, the rule in *Gamble v. Wimberly* were to be applied, then the payments received by the defendant would have been sufficient to retire the obligation of the Lyon County Bank on October 21, 1936, and leaving a surplus of $1,806.15, as of that date, and the defendant would then be accountable to the plaintiff for such surplus and for the following sums received thereafter:

On October 15, 1937, by E. S. Wedertz	$1,095.00
On October 29, 1937, by H. E. Carter	873.05

or the sum of $3774.20, together with the securities still in the defendant's possession.

ASSIGNMENTS XII AND XIII. (Tr. p. 68.)

XII.

The court erred in refusing to make the special findings timely requested by the complainant, notwithstanding such requested findings are supported by the weight of the evidence and the (67) evidence would support no finding or conclusion other than that requested by the complainant.

XIII.

The court erred in failing to find or adjudge on the material issue, drawn in issue, respecting the legality of and warrant or lack thereof, for the so-called recasting and revising and re-allocation

of credits on the collaterals and on the primary obligation in accounting for the avails from the said collaterals, or the sufficiency of said accounting.

While the trial court did sign special finding number IV (Tr. pp. 57 and 58) to effect that $2930.75 interest-avails from the collaterals in the period from February 16, 1932, to October 21, 1936, inclusive, the court nullified this concession by signing special finding number V (Tr. p. 58) to effect that the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank (February 16, 1932).

The issue was a material one in the case and the court's two acts amounted to a failure and refusal to find and decide on a material issue in the case. Besides the evidence supports finding IV (Tr. pp. 57-58) and there is no evidence to support finding V. (Tr. p. 58.)

Furthermore, in the defendant's answer (Tr. pp. 23-25) there is a defense by way of counterclaim consisting of five paragraphs. (Tr. pp. 24 and 25.) These set up affirmatively the collection as interest on the collaterals of $14,658.84 (paragraph III) and the application of this sum on the primary obligation (paragraph IV). This defense and counterclaim is new matter and serves the purpose of a complaint on an allied matter.

In the complainant's reply (Tr. pp. 26-39) complainant set up an answer and defense to the new matter and counterclaim of defendant, consisting of one paragraph. (Tr. pp. 35-36.) This is the same as

an answer to a complaint and called for a reply, but the defendant did not reply.

The complainant alleged that the defendant had stated the account and had changed it after the complainant had altered its position, so that defendant is estopped to change the record of the transaction. For want of a reply traversing the facts alleged, they are deemed admitted.

That the claim of estoppel is recognized in law see as to shifting theory or record:

Adams, Receiver, v. Champion, Trustee in Bankruptcy, 294 U.S. 231-238.

The complainant objected (Tr. p. 130, paragraph VI) to the original finding VII (Tr. p. 127) proposed by defendant.

The complainant also proposed (Tr. p. 137) substitute finding number VIII reciting the statement of account made by defendant in 1937, the subsequent change in the record and the resulting detriment to Lyon County Bank.

When the court's final findings were signed the complainant objected (Tr. p. 148) to the omission of complainant's proposed findings of fact "VI, VII and VIII".

We contend that the issue as to the change in the record was material and that in refusing to finally determine that issue, or in refusing to find as requested, the court committed error. As above shown specific objections were made. Exceptions were allowed. (Tr. pp. 54-55 "Minutes".)

The requests were timely:

Century Indemnity Co. v. Nelson, 82 L. Ed. (U.S.) 535.

Compare:

Continental Nat. Bank v. National City Bank, 69 Fed. (2d) 312 (C.C.A. 9th).

In

Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co., 62 Fed. (2d) 530-536,

it is said at 536:

"It should be stated also that the denial of a request for a special finding is not reviewable unless the request is based on the ground that the evidence will sustain no other conclusion, otherwise, the denial is the mere exercise of discretion not reviewable on appeal * * *"

See also

Union Bleachery Co. v. United States, 79 F. (2d) 549, Opinion, paragraphs 1 and 2.

We submit that in this case, after the court had written one opinion (Tr. p. 41; 23 Fed. Suppl. 763) covering a general judgment, that when special findings were requested and special findings (like a special verdict) were finally drafted, the omission of material special findings on material issues, is error.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment and decree of the district court should be reversed.

Dated, Carson City, Nevada,
January 9, 1939.

GEORGE L. SANFORD,
A. L. HAIGHT,
Attorneys for Appellant.

No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLEE'S BRIEF.

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Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLEE'S BRIEF.

STATEMENT OF FACTS.

On the 1st day of July, 1931, the Lyon County Bank executed to The Reno National Bank its note for $60,500 payable on demand with interest at the rate of 8% per annum, and pledged to The Reno National Bank, as security for the payment of the said note, certain securities mentioned and set forth in the complaint.

When the appellee, on the 9th day of December, 1932, was appointed Receiver of The Reno National Bank, the aforementioned note was an asset of The

Reno National Bank. The Lyon County Bank had gone into insolvency on the 16th day of February, 1932. The question involved in this suit is whether or not interest can be paid on the note which the appellee holds after the date of insolvency of the Lyon County Bank.

This is the only question of law involved in the case, and is so conceded by appellant on page 14 of its brief, as follows:

> "The question of law is whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and whether the rule requiring a ratable distribution to creditors permits any claim to be increased by interest after insolvency, or permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest."

ARGUMENT.

If the above is the only question of law involved, then it would seem to be unnecessary to go into any discussion of the federal authorities on the same question. However, I think it would be of benefit to the Court to discuss the federal authorities.

It may be admitted that formerly there was quite some diversity of decisions on this very question. However, this much is clear, that the appellee in this case

had the right to apply the avails, interest or dividends collected on the pledged securities to the payment of interest and principal until both had been paid in full.

That is the rule laid down in the case of

Gamble v. Wimberly, 44 Fed. (2d) 329,

as follows:

> "There is one further point which remains to be disposed of, because possibly presented by the record in the present case, although the record is not clear on this point. We refer to the question whether, assuming that interest and dividends accrued upon some of the collateral since the date of the debtor bank's insolvency, such interest and dividends are to be excepted from the rule here laid down, and may be retained by the trustee. Such an exception was made in the Sexton Case, the Court relying upon the English rule (page 346 of 219 U. S., 31 S. Ct. 256), and we believe that a similar exception is proper in the present case, because, if granted a creditor under his more restricted rights under the Bankruptcy Act, a fortiori he would seem to be entitled to as much in the present situation."

Under the authority immediately cited, we need not depend on the avails or interest or dividends collected on the pledged securities for the payment of the interest and principal until both have been paid in full, but we may apply any payments of whatsoever kind or character to the payment of principal and interest.

In support of this contention, I cite the following:

> "Interest and dividends accrued upon some of the securities after the date of the petition. The English cases allow these to be applied to the

after-accruing interest upon the debt. Ex parte Ramsbottom; Ex parte Penfold; and Quartermaine's Case,—supra. There is no more reason for allowing the bankrupt estate to profit by the delay beyond the date of settlement than there is for letting the creditors do so. Therefore, to apply these subsequent dividends, etc., to subsequent interest, seems just."

Sexton v. Dreyfus, 219 U. S. 345, 55 L. Ed. 244.

This very question has been fairly and squarely decided by the Supreme Court of the United States in the case of

Ticonic Nat. Bank v. Sprague, 303 U. S. 406,

decided on March 7, 1938. It is said in the opinion:

"The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency.

"On March 28, 1931, respondent Lottie F. Sprague delivered $5,022.18 to the trust department of the Ticonic National Bank of Waterville, Maine, in trust, under an agreement which authorized the trustee to invest in bonds or securities and to deposit at least $1,000 in its savings department at usual rates of interest; required specified monthly payments, subject to certain conditions, to Margaret Sprague, also a respondent here; and reserved to the grantor the right to revoke the trust and resume possession of the trust funds.

"The Ticonic Bank had been authorized by the Federal Reserve Board to act in a trust capacity, as provided in Section 11 (k) of the Federal Reserve Act, as amended (12 U.S.C., Sec. 248 (k)). That Act provides that funds held in trust awaiting investment 'shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities' approved by the Board of Governors of the Federal Reserve System, and further provides that 'In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.'

"Pending investment of funds under the Sprague trust and pursuant to its resolution implementing the statutory provision just quoted, the Ticonic Bank placed the funds of this trust, along with other trust funds awaiting investment or distribution, as a deposit in its commercial checking department to the credit of its trust department, and secured the total amount of such funds by setting aside in the trust department bonds, including $20,000 Kingdom of Denmark 6's, 1942, at least equal in value to the total amount of such deposits.

"On July 29, 1935, respondents, the settlor and beneficiary, brought this suit in the District Court for Maine to have the bonds held as security with respect to the trust. It appears that on August 3, 1931, Ticonic Bank sold its assets (including the Denmark bonds) to the Peoples National Bank (later called Peoples-Ticonic National Bank) in consideration of its agreement to 'assume or pay all the indebtedness of said Ticonic Bank to its

depositors'; that Ticonic Bank then went into voluntary liquidation; that on March 4, 1933, the Peoples-Ticonic Bank was closed; that Arthur Picher was appointed receiver for Peoples-Ticonic Bank on November 6, 1933, and subsequently, on June 28, 1934, for the Ticonic Bank, which had been continuing its voluntary liquidation.

"The lower courts treated the suit, brought against both banks and against Picher as receiver, as one to assert and enforce the lien protecting the uninvested funds. They held that, in view of Section 11(k) of the Federal Reserve Act, as amended, respondents had acquired a lien upon the bonds set apart by the Ticonic Bank to secure the deposit of the trust department; and that this lien had never been discharged or divested and so extended to the proceeds of the Denmark bonds, which had been sold by the receiver for $20,722.66. We do not pause to state the conclusions of fact and of law by means of which the lower courts arrived at this result, for in the grant of the writ of certiorari this Court declined to review the ruling that a statutory lien for the protection of the owners of the funds held for investment extended to the proceeds of the Denmark bonds, the lower courts having predicated their decision in large part on the facts of this particular case.

"The decrees below did not end with the matters just stated. The District Court, finding that the proceeds of the bonds exceeded the trust funds on deposit, held the respondents entitled to payment in full of $3,649.65, the amount to which the Sprague trust account had been reduced, with interest from the date of the filing of the bill of complaint. At first the Circuit Court of Appeals reversed that part of the decree allowing interest,

but on rehearing it affirmed the decree in toto, approving the allowance of interest out of the proceeds of the Denmark bonds, which it assumed were sufficient to meet with interest the amount of all trust deposits. It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid.

"The attention of this Court was called to the fact that the ruling conflicted with decisions in other circuits, where secured creditors were held not entitled to any interest after the suspension of the national bank, and for this reason certiorari was granted, limited to this question of interest.

"As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. Compare Stewart v. Barnes, 153 U. S. 456, 462; United States v. North Carolina, 136 U. S. 211, 216.

"The bank's obligation to pay interest as damages for the detention of the debt is not cut off by suspension of its business and receivership. The principle has been established, and claimants held entitled to such interest, in cases where the principal amount of each of the claims was paid in full from the assets of the bank (National Bank of the Commonwealth v. Mechanics' National Bank, 94 U.S. 437), including if necessary the double liability of the shareholders. (Richmond v. Irons, 121 U. S. 27, 64.)

"It is true that in the liquidation of national banks, dividends from the general funds on un-

secured claims are made pro rata upon the amount of each claim as of the date of the insolvency, White v. Knox, 111 U. S. 784. This method of distribution gives a proportional part of the available funds to each creditor, in accordance with the statute requiring a 'ratable dividend'. R. S. Sec. 5236. Whether the reason for this method of determining dividends is to avoid prejudice from the inevitable delay of court proceedings for liquidation (In re Humber Ironworks and Shipbuilding Company, IV Ch. App. Cas. 643, 646; American Iron and Steel Manufacturing Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266; cf. People v. American Loan & Trust Company, 172 N. Y. 371, 379); to facilitate administration (Sexton v. Dreyfus, 219 U. S. 339, 344; Chemical National Bank v. Armstrong, 59 Fed. 372, 387); or because on that date the creditors acquire a right in rem against the assets in the hands of the receiver (Chemical National Bank v. Armstrong, supra, 379; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 140; Sexton v. Dreyfus, supra, 345) is immaterial. Dividends are paid on that basis. It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors. Armstrong v. American Exchange National Bank, 133 U. S. 433, 470.

"The rule of White v. Knox, supra, does not require that interest be denied to the secured creditors unless the principle of equality of distribution

is to be applied as between all creditors. Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the bank gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any general creditor, and in so far as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. Compare Merrill v. National Bank of Jacksonville, 173 U. S. at 146; Aldrich v. Chemical National Bank, 176 U. S. 618, 638. But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution (American Iron and Steel Manufacturing Co. v. Seaboard Air Line Ry., supra, at 266; Chemical National Bank v. Armstrong, supra, at 376-377), and interest accruing after insolvency may not be withheld on account of that principle.

"The rule as to the date to which interest is to be allowed on secured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to the lien of individual creditors, unless we are to disregard the rights in these assets acquired prior to insolvency. But 'liens, equities or rights arising * * * prior to insolvency and not in contemplation thereof are not invalidated.' Scott v. Armstrong,

146 U. S. 499, 510; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 145. By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property 'in addition to their claim against the estate of the bank.' Section 11(k) of the Federal Reserve Act as amended. The statutory lien prior to receivership withdrew the pledged security from the assets of the bank available to general creditors, in so far as might be necessary to satisfy the lien. Though title to the collateral was in the name of the bank, it was subject to this lien, and to that extent the property pledged could not properly be said to belong to the bank for purposes of distribution to creditors. Scott v. Armstrong, supra at 510.

"As the obligation to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied.

"With respect to analogous liquidations the rule just announced has long been in force. This Court has already held that a lien-holder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (Coder v. Arts, 213 U. S. 223, 245, affirming, 152 Fed. 943, 950) or into equity receivership (American Iron and Steel Mfg. Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261), and though interest will be denied the unsecured creditors if the assets are insufficient to

pay all claims in full. Compare In re Humber Ironworks and Shipbuilding Co., IV Ch. App. Cas. 643, with In re Humber Ironworks and Shipbuilding Co., V Ch. App. Cas. 88. The same rule was applied to state banks in Washington-Alaska Bank v. Dexter Horton National Bank, 263 Fed. 304, 306.

"Petitioners suggest that the rule just laid down may have the effect of penalizing the unsecured creditors for the precaution of the receiver in litigating doubtful claims asserted against segregated assets. This could be true only where the interest accruing to the secured creditors during the pendency of the litigation exceeds the appreciation in value of, and the income from, the security. And since in many cases if the receiver is successful his conduct of the litigation will inure to the advantage of the general creditors, they may fairly be charged with the expenses of contesting the claim, including interest by way of damages. Cf. Chemical National Bank v. Armstrong, supra, 59 Fed. at 384.

"Affirmed."

There is no chance to misunderstand the law under the manifestation of the last decision of the Supreme Court of the United States on this question. We are entitled to payment of principal and interest in full from the proceeds of the collateral, be it principal or interest or dividends.

In addition to the above, the case of

State ex rel. Hansen, Sup'r of Banking v. Chelan County et al., 54 P. (2d) 1006,

from the Supreme Court of the State of Washington is in point. The decision is as follows:

"This action was brought by the state supervisor of banking to require the county treasurer of Chelan County to pay over to him as such supervisor certain funds in her hands which, it was claimed, were assets of the estate of an insolvent bank. To the petition, a demurrer was interposed and sustained. The bank examiner refused to plead further and elected to stand upon his complaint. Judgment was entered dismissing his petition, from which he appeals.

"The facts are these: The Dryden State Bank was a corporation conducting a banking business at Dryden, in Chelan County. On or about January 2, 1931, the treasurer of Chelan County designated this bank as a depositary for public funds required by her to be kept as such treasurer. At the time the bank was designated as a depositary, a contract was entered into by it with the county to pay interest at 2 per cent. per annum on the average daily balances of moneys deposited by the county treasurer. The contract contained the further provision that: 'In event the party of the first part (the bank) becomes insolvent, or the checks or demands of the party of the second part, acting by and through its treasurer, are not met and complied with by the payment of the moneys on deposit, then such funds on deposit shall bear interest from the date of insolvency or default and refusal or neglect to pay, at the rate of six per centum per annum.'

"The bank became insolvent February 2, 1932, and passed into the hands of the state bank examiner. The county treasurer, instead of taking

a surety bond to cover her deposits, took a pledge of securities from the bank, which, by the statute (Rem. Rev. Stat. Sec. 5563), she was permitted to do. After the closing of the bank, the treasurer from time to time collected upon the pledged securities, and on May 1, 1934, all pledged securities had been liquidated and there had been received therefrom by the treasurer $4,687 in all. This was $687 in excess of the principal on deposit when the bank closed. The treasurer contended that out of the $687 there should be withheld for the county $469.09, that being the amount of interest that would have accrued from the time the bank closed, if computed at the rate of 6 per cent. per annum, upon the diminishing balances of the deposit. She offered to pay the state bank examiner the difference between the two sums mentioned, or $226.91, in full settlement. The bank examiner took the position that the contract made January 2, 1931, to pay 6 per cent. interest after insolvency, was one which the bank had no power to make, and that the highest rate of interest the treasurer was entitled to demand was 2 per cent. per annum. The bank examiner claimed that he was entitled to $533.64 out of the $687 remaining after paying the principal on the indebtedness out of the liquidated securities. The treasurer, as already indicated, refused to pay more than $226.91.

"The ultimate question presented upon the appeal is whether the bank had a right to make a contract with the treasurer to pay 6 per cent. upon the deposit after insolvency.

"Rem. Rev. Stat. Sec. 5562, provides that each county treasurer in this state shall annually, on the second Monday in January, designate one or more

banks in the state as depositary or depositaries of public funds held and required to be kept by such treasurer. Section 5563 provides, that, before any designation shall become effectual and entitle the treasurer to make deposits, the bank or banks so designated shall file with the county clerk of such county 'a surety bond to such county treasurer, properly executed by some reliable surety company' qualified under the laws of this state to do business herein, in the maximum amount of the deposits designated by the treasurer to be carried in such bank or banks. This section further provides that the depositary or depositaries may deposit with the county treasurer 'in lieu of the surety bond herein provided for' any of the following enumerated securities, specifying them. Section 5564 provides that, before any designation shall become effectual and entitle the treasurer to make deposits, the bank or banks so designated 'shall also enter into a written contract with the county whose treasurer is to make such deposits, to pay to said county, * * * two per centum per annum on the average daily balances of all moneys so deposited by such county treasurer in said bank while acting as such depositary.'

"A consideration of the three sections of the statute mentioned, from which excerpts are quoted, discloses that in none of them is there any provision limiting or prohibiting the county treasurer from contracting for a greater rate than 2 per cent. in the event of insolvency. Section 5564, in the excerpt quoted, says that there shall be 2 per cent. paid on the average daily balances while the bank is acting as such depositary. After the bank became insolvent, it could not be said to be

a depositary paying 2 per cent. on daily balances. When the insolvency occurred, the bank's liability became fixed and settled in the amount of the deposit at that time, which in this case was $4,000.

"Turning now to the question of whether the bank had a right to make the contract, Rem. Rev. Stat. Section 3261, which is one of the sections of the state banking law, provides that no bank shall pledge any of its securities to any depositary, 'except that it may qualify as depositary for * * * public funds deposited by any public officer by virtue of his office and may give such security for such deposits as are required by law or by the officer making the same.'

"In this case, as above seen, the security required by law is either a bond or in lieu thereof certain designated bonds, notes, or other obligations as specified in section 5563. Section 3261 goes farther than covering the pledging of securities for deposits as required by law and authorizes the pledging thereof of such securities as 'the officer making the same' may require. In this case, the officer required the deposit of the securities which were taken in lieu of a surety bond, and also a contract to pay 6 per cent. interest after insolvency. Had the treasurer taken a surety bond to protect her deposits under the contract mentioned, there can be no doubt that the surety company would be bound by the contract and required to pay 6 per cent. interest after insolvency, because its liability would become fixed and enforceable at that time. Lucas v. American Bonding Co., 174 Wash. 433, 24 P. (2d) 1084.

"The Legislature, in authorizing the county treasurer to take designated bonds, etc., in lieu of

a surety bond, certainly did not intend that public funds should have less protection when the substituted securities should be taken rather than a surety bond. The statute says the bonds, etc., may be taken in lieu of a surety bond. Neither the county nor the bank having exceeded its authority in making the contract to pay 6 per cent. after insolvency, it follows that the contract was valid and enforceable. By virtue of the contract and the pledging of securities, the county treasurer became a creditor of the insolvent bank, protected by its contract, and therefore entitled to be paid in full, even though the bank liquidation did not produce sufficient assets to pay the other depositors.

"In Spring Coal Co. v. Keech (C.C.A.), 239 F. 48, 53, L.R.A. 1917D, 1152, after reviewing the authorities, it was said: 'We think a careful reading of all the authorities will show that where estates are insolvent and all the claims are of like dignity, the court declares the dividend upon the basis of the amount of principal due at the time the property passed into the hands of the court, because it is immaterial whether the dividend is calculated upon the interest and principal combined, or the principal alone; but where there are claims of different classes, and one is secured by a mortgage of real estate, the holder of such mortgage is entitled, not only to the principal, but to the interest that accrues up to the time of satisfaction, even though nonlien creditors may not receive any dividend at all. This must be so if the court enforces contracts as parties made them.'

"In American Iron, etc., Co. v. Seaboard Air Line Railway, 233 U. S. 261, 34 S. Ct. 502, 505, 58

L. Ed. 949, it is said: 'Principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. (Citing authorities.)'

"In the case now before us, the county treasurer, having taken the pledge of securities and the contract, became a creditor of a higher class than the other depositors.

"The judgment will be affirmed."

In order to avoid the force of the foregoing cases, counsel cite several authorities which I shall now proceed to discuss.

The case of *U. S. v. Knox,* 111 U. S. 784, 28 L. Ed. 603, was not a case where the question of the right of a secured creditor to receive interest after insolvency was involved. It was a case of a general creditor seeking to attach interest after insolvency. We readily concede that a general creditor is not entitled to interest after insolvency.

In any event, the case of *U. S. v. Knox* was discussed in the case of *Ticonic National Bank v. Sprague,* supra, wherein the Court says:

"The rule of *White v. Knox* (U. S. v. Knox is the same case) does not require that interest be denied to the secured creditors unless the principle of equality of distribution is to be applied as between all."

The above means, of course, that if there were a number of secured creditors, all of equal rank, then one

of them would not be entitled to interest as against the other.

The case of *Greva v. Rainey, Wood, et al.,* 33 Pac. (2d) 697, was a case where the rights of general creditors, depositors and stockholders were involved, and makes no reference to secured creditors.

The case of *Ledford v. Skinner,* 69 Pac. (2d) 519, was a case wherein the rights of depositors were involved, all of equal rank.

In the case of *In re Farsch,* 31 Pac. 755, the Court says:

> "We think that the plain and universally recognized principle of equity demands that a secured creditor must first exhaust his security, apply the proceeds to the diminution of his claim, and then share pro rata with the other unsecured creditors on balance of claim."

That is the only question that was involved in the case, and the question of interest to secured creditors after insolvency was not involved or raised.

To the same effect is the case of *First National Bank of Seattle, v. Mansfield,* 221 Pac. 595.

In the case of *Beaver Co. v. Home Indemnity Co.,* 52 Pac. (2d) 435, it was said that the question as to interest was in a sense declared to be moot because the assets were insufficient to pay the principal. (Quotation on page 458, column 2.)

In the case of *First Wisconsin National Bank of Milwaukee v. Kingston,* 94 A. L. R. 465, cited in appellant's brief, it was held:

> "A secured creditor of an insolvent bank is entitled to dividends upon the full amount of his claim until the same is fully paid rather than upon the balance remaining after crediting thereon the amount realized by the enforcement of the security."

The question of interest after insolvency was not involved.

In the case of *Broadway-Main Street Bridge Dist. v. Taylor,* 57 S. W. (2d) 1041, a statute of the State of Arkansas was construed, and has no application here, as we have no such statute, and in that case, there was no reference to interest after insolvency.

The case of *Louisville v. Fidelity & Columbia Transfer Co.,* 54 S. W. (2d) 40, is not applicable, as the question of interest after insolvency was not involved. The decision went to authority of a bank to pledge its assets.

In the case of *In re Victor,* 166 N. Y. S. 1012, the decision went to the question as to the right of a secured creditor to dividends. No question of interest after insolvency was involved.

In the case of *State v. State Bank of Alamagordo,* 32 Pac. (2d) 1017, it was held that on insolvency of a state bank, secured creditor was entitled to prove claim and receive dividends on full amount of claim regardless of any sums realized on securities after adjudication of insolvency, but not for more than full amount. No question of interest after insolvency was involved.

In the case of *U. S. Fidelity & Guaranty Co. v. Malia, Bank Commissioner,* 49 Pac. (2d) 954, all that was held was that a secured creditor of an insolvent bank must first exhaust his security and apply proceeds of value thereof upon his claim, and can participate in funds for distribution only upon basis of balance thus remaining after giving such credit. No question of interest after insolvency was involved.

Referring to the above case, counsel states as follows:

> "The Court in this case construed the Utah bank act and came to the conclusion that a secured creditor must surrender or account for the value of his collaterals at the time of insolvency, apply the avails on the claim as fixed on the closing *without added interest.*"

I cannot find the words *"without added interest"* in the decision. This must be an inadvertence on the part of counsel, or an outgrowth of their imagination.

In the case of *Merrill v. National Bank of Jacksonville,* 173 U. S. 131, 43 L. Ed. 640, the only question decided was that a secured creditor of an insolvent national bank may prove and receive dividends upon his claim as it stood at the time of the declaration of insolvency without crediting either his collaterals or collections made therefrom after such declaration, subject always to the provisions that dividends must cease when from them and from collaterals realized the claim has been paid in full. No question of interest after insolvency was involved.

Whatever the decision in that case may have been, the case is referred to and disregarded in the case of *Ticonic National Bank v. Sprague,* supra.

The remaining authorities cited by counsel in their brief do not affect the question involved in this suit, i. e.: Is a secured creditor entitled to interest after insolvency?

It may be conceded that there has been a diversity of opinion as to whether or not interest could be allowed to a secured creditor after insolvency, but the question now seems to be put at rest entirely by the case of *Ticonic National Bank v. Sprague,* supra, and it may not be amiss to state that the Comptroller of the Currency of the United States, since the decision in that case, has universally followed that rule.

There being no authority from the Supreme Court of the State of Nevada on this question, I think we may assume that this Court will hold that the Judge of the District Court was justified in following the decisions of the Federal Courts, unless some strong showing to the contrary can be made.

The case nearest to a decision by the Supreme Court of the State of Nevada is the case of *Organ v. Winnemucca State Bank & Trust Co.,* 26 Pac. (2d) 237. In that case, as a matter of fact, the judgment allowed a secured creditor his full claim with interest, but, to be perfectly candid with the Court, the question of interest was not raised. The question involved was the authority of a bank to borrow money in excess of the par value of all its capital stock.

Counsel for appellant seem to attach great importance to the statute of the State of Nevada, as follows:

> "* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter *incurred* against any of the assets of the bank, etc."

Counsel confuse the word "incur" with the word "accrue". According to Webster, "incur" means: "to become liable to by one's own action; contract, as a deed."

According to 22 Cyc., page 73, "incur" is defined as a word used and employed "to become liable for, subject to, to bring on, to occasion or to cause".

According to Words & Phrases, "incur" means to become liable for.

The pertinent question, therefore, would be: When did the Lyon County Bank become liable for interest?

This indebtedness, as to both principal and interest, was incurred on the 1st day of July, 1931. Counsel's argument would lead to the following conclusion:

If a man borrowed $10,000 on a note payable $1000 annually, and the maker of the note became insolvent at any time before full payment, the payee of the note could not collect for the installments accruing after insolvency, as the maker would contend that the remainder of the note was incurred thereafter. The reasonable construction would be that the indebted-

ness was incurred at the time of the signing of the note and would apply to any new indebtedness, but not to indebtedness accruing thereafter.

If the Nevada law had said that no lien or liability thereafter ACCRUING could be collected, then counsel's contention might be correct, but there is a vast difference between "incurring" and "accruing" or "incurred" and "accrued". If the lawmakers had meant that no indebtedness or liability thereafter ACCRUING could be paid, it would have been very easy to say so, but they did not say "accrued". They seem *ex industria* to have said "incurred". What the statute means is that no new debt could be created thereafter because in such case an equal distribution to creditors could not be made. They meant a man could not obligate himself by a new instrument, or do any new act creating or incurring an indebtedness after the date of insolvency.

When the Lyon County Bank signed the note, it agreed to pay the interest just as much as it did the principal, and the liability for both principal and interest was incurred at that time. The interest accrued afterwards.

It must be borne in mind that the claim of the appellee is on a contract. It is not a case where interest is allowed as a penalty or for damages, but it is a contractual relation. There is no difference in the principal and interest as to the time when they were incurred. The promises to pay principal and interest were simultaneously made and both were in-

curred at the time the note was signed, and the obligation was incurred at the time of the signing of the original note.

Counsel have cited no authority in support of the interpretation of Section 702, Nevada Compiled Laws of 1929. I have been unable to find much authority on this subject. My idea would be that no one has ever heretofore placed the construction on the statute that counsel try to place on it. There is one case, however, that seems to have some bearing. I refer to the case of

Knight v. Whitman, 99 Am. Dec. 652,

as follows:

> "Under Act Feb. 10, 1866, providing that, in addition to personal property exempt from execution, on liabilities incurred after June 1, 1866, there shall be exempt certain other additional property, where an action had been brought prior to the date fixed by such statute, and judgment was rendered for defendant, which was reversed on appeal and rendered for plaintiff, the judgment determined that the liability existed at the time suit was brought, and hence the liability of defendant was incurred prior to the 1st day of June, 1866."

> "In Agawam Bank v. Strever, 18 N. Y. 502, the note sued on was left with the bank as collateral security for all liabilities incurred; and the court, in speaking of this writing, said: 'It is true that upon a strict, grammatical construction of these terms, they would be held to embrace

only liabilities which had been already incurred. The word "incurred", being in the past tense, when used without other words to modify its meaning, would in strictness relate exclusively to past transactions.' It was held, however, that it was proper to resort to evidence of attending circumstances to assist in ascertaining the meaning and intention of the parties."

Beemer v. Packard, 28 N. Y. Supp. 1045, 1046.

Counsel also contend that the pledge agreement, wherein it is stated:

> "As collateral security for the payment of all our present indebtedness to The Reno National Bank of Reno and all of the future indebtedness to said bank which we may incur hereafter from any cause or upon any consideration, we have assigned and do hereby assign, deliver and deposit with said Reno National Bank, the following described property * * *"

does not secure the interest accruing thereafter.

What is said above applies to this contention. Here the whole question hinges upon the interpretation of the word "incur". The indebtedness was incurred at the time of the making of the agreement. It makes no reference to indebtedness accruing. The obligation to pay the interest was just as binding and was just as much a debt or liability as the obligation to pay the principal. The obligation to pay the principal and interest was incurred at that time, but the interest accrued thereon, and the word "accruing" is entirely left out of the agreement.

Counsel takes up much space in their brief arguing questions of fact, i. e., as to interest arising out of the collection of interest on the pledged securities, and the application thereof, and upon the further question of the application of payments.

The Lyon County Bank was declared insolvent on the 16th of February, 1932. The note on pages 15 and 16 of the transcript of record shows that only one payment was made before insolvency, viz., $2420 on December 16, 1931, which paid the interest to December 31, 1931. All the other payments were made after insolvency. Therefore, such payments must have accrued on the collateral security and it would make no difference whether they were applied as principal or interest under the rule in the case of *Ticonic National Bank v. Sprague,* supra.

If appellee is entitled to payment of interest accruing after insolvency of the Lyon County Bank, then there would be no point in arguing as to what amounts of interest arose from the collection of interest on the securities or the application of payments.

SUMMARY.

The case of *Ticonic National Bank v. Sprague,* supra, clearly and concisely lays down the rule adopted by the Federal Courts. Right at the beginning of the decision, we find the following:

> "The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest

for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency."

That clear and concise statement of the question involved is answered as follows:

"As the obligation to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied."

If the above is true, as applying to a creditor of national bank, there is no reason why it should ot apply to a creditor of any bank, even though the reditor in this case happens to be a national bank.

That leaves the sole remaining question of the application of the statute of the State of Nevada. That tatute provides that no bank, corporation, firm or individual knowing of such taking possession by the xaminer, shall have a lien or charge for any payment, dvance or clearance thereafter made or liabiilty hereafter *incurred.*

How the words *"thereafter incurred"* can be contrued as meaning *"thereafter accrued"* is entirely eyond my comprehension.

I feel that I have shown to the satisfaction of this Court that the Judge of the District Court followed the correct rule as laid down by the latest decision of the Supreme Court of the United States, and that he correctly interpreted the Nevada statute.

Under the authorities I have cited, I submit that the judgment of the lower Court should be affirmed.

Dated, Reno, Nevada,
February 17, 1939.

Respectfully submitted,
N. J. BARRY,
Attorney for Appellee.

No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

APPELLANT'S REPLY BRIEF.

Appellee states: "The question involved in this suit is whether interest can be paid on the note which the appellee holds after the date of insolvency of the Lyon County Bank".

But should this court answer that question in the affirmative there will remain the further question as to the manner in which such interest ought to be paid.

Appellee says appellant concedes the accuracy of his statement and cites the statement of the question on page 14 of appellant's brief.

Appellant did not make that statement as the "only" question of law in this case, but as the one major question of law:

> "There is one major question of law in the case and one major question of fact."
>
> Appellant's Brief, page 3.

Appellant does not waive the assignments of error contained in the transcript, pages 63 to 68 inclusive and relied on, pages 13 and 14 of appellant's brief.

Appellee does not dispute the other questions of law or the questions of fact. Therefore he agrees with appellant as to them.

Appellee takes the appellant's statement of the major question of law and divides it into three parts, as follows:

> "The question of law is (1) whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and (2) whether the rule requiring a ratable distribution to creditors permits any claim to be increased by interest after insolvency, or (3) permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest."

Appellee admitted on the trial and admits in the brief, by failing to deny the proposition advanced on page 32 of appellant's brief, that the Nevada banking law is exclusive, but he contends that the Nevada law is not applicable to the facts here presented. He contends that interest may be added to the face of this alleged "secured" obligation, after insolvency without

doing violence to the principle of ratable distribution but he admits that when a secured creditor looks to his collaterals, he may apply toward interest on the obligation after insolvency, only the interest that he has collected from his collaterals after insolvency and he must credit all other collections on the face of the obligation.

Appellee therefore is in agreement with appellant as to the manner of applying interest from the collaterals, if any interest is to be computed on the obligation from date of insolvency at all.

Appellee argues the three parts of the question in their inverse order but we prefer to retain the order of our opening brief. It is the logical order beginning with the Nevada law, following with the Nevada contract and closing with such decisions as may be applicable.

This suit is not affected by the National Bankruptcy Act or the National Bank Act or the Federal Reserve Act. The debtor stands in the shoes of an insolvent state bank. The receiver represents an insolvent national bank, but he might well be an individual.

I. WHETHER UNDER THE NEVADA STATUTE INTEREST ON A CLAIM AGAINST AN INSOLVENT BANK COMPUTED OVER ANY PERIOD AFTER INSOLVENCY, CAN BE CHARGED OR COLLECTED.

Strictly speaking this is not a "claim" in insolvency proceedings. The creditor did file a claim but did not ask or receive stock in the mortgage corporation in lieu of his rights and on which he would be

entitled to receive dividends in payment. He looked to his security. We contend he has no lien or charge for any interest incurred after the known fact and day of taking over in insolvency, February 16, 1932. (Sec. 53, Nevada Banking Act of 1911; N. C. L. 1929, Sec. 702.) Preference was forbidden. (Sec. 35, same act; N. L. C. 1929, Sec. 684.) The pledge of July 22, 1931, was for a pre-existing debt and a badge of fraud for both principal and interest, if considered "incurred" July 1, 1931. The interest is considered incurred after insolvency and a lien or charge for payment is forbidden by Sec. 53 of the Nevada act.

Appellee at page 22 et seq. questions our interpretation of the word "incurred" as used in Sec. 53 of the Bank Act of 1911, N. C. L. 1929, Sec. 702. See appellant's brief pages 23, 27, 28, 29, 41, 45. Appellee states we have cited no authority. We call attention to the authorities cited on pages 41, 43 and 44 of appellant's brief which appellee has ignored.

Even taking the definition in "Words & Phrases" and in 22 Cyc. 73, quoted by appellee on page 22, it appears that one incurs a liability or a payment when the time comes to discharge it. This cannot arise until it can be fixed in a definite sum. The interest in question is that incurred after February 16, 1932. The theory of the act is well illustrated in appellant's brief, page 49:

> "if interest has been prepaid by the insolvent corporation for any period subsequent to such appointment, such prepaid interest will be deducted from the amount of the claim as proved."
>
> *City of Louisville v. Fidelity & Columbia Trust Company,* 54 S. W. (2d) 40.

Appellee cites "Words & Phrases" but we find in that work Vol. 2 (second series), page 1025, a quotation from *Bank of Indian Terr. v. Eccles,* 91 P. 695-697:

> "It has been suggested in the argument that this inhibition relates only to contractual obligations and does not affect imposed obligations or liabilities; that the salary of the sheriff was fixed by the laws of Oklahoma, and the law required him to be paid certain fees by the county; and that it was not the intention of Congress to take from the counties the authority to pay this class of obligations. The language used by Congress will not admit of this contention. The law says 'contracted or incurred'. The word 'contracted' includes all of one class, and the word 'incurred', to be given any meaning whatever, must be held to include another class. There are only two classes of county obligations, contractual and imposed, and evidently Congress meant to include both classes. The word 'incurred' is defined by Webster as 'to become liable or subject to; to render liable or subject to'. Black says: 'Men contract debts. The incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. "Incur" means something beyond contracts, something not embraced in the word "debt" '. In Scott v. Tyler, 14 Barb. (N. Y.) 202, 'incur' is held to mean 'to become liable for'. Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. 60: 'To become liable for'. In Beekman v. Van Dolsen, 24 N. Y. Supp. 414, 70 Hun. 288: 'To become liable for'. In Deyo v. Stewart, 4 Denio (N. Y.) 101: 'Brought on himself'. In Ashe v. Young, 68 Tex. 123, 3 S. W.

> 454: 'Brought on, occasioned, or caused'. Hence it is apparent that the word 'incurred' means more and embraces a different class of liabilities or obligations from these contracted. It means the indebtedness imposed upon the county by salaries of county officers and other required and necessary expenses, all of which, to be a charge against the lot sale fund, must be authorized or approved by the Secretary of the Interior. * * *"

Counsel for appellee quotes from *Beemer v. Packard,* 38 N. Y. S. 1045-1046.

The quotation is a summary of the case of *Agawam Bank v. Streever,* 18 N. Y. S. 502-510.

These cases are not in point. The question there was whether parol evidence could be admitted to show the intention of the parties in using the word "incurred" in the written contract or pledge. The court held that while, grammatically, the word would look to the past, the case was such that oral evidence to bring out or vary the meaning was permissible.

That was a private obligation governed by a private contract. Of course no opportunity exists in the instant case to test by oral evidence the meaning of the legislative enactment.

The meaning of the word "incur" is considered in Vol. 31 Corpus Juris, page 410 (from whence counsel apparently obtained the citation to *Beemer v. Packard.*)

> "The mere giving of a note as evidence, and security for the payment, of a debt, is not the

creation, making or incurring of a debt within the meaning of this constitutional provision."

J. B. McCrary Co. v. Town of Brantley, 79 So. 602-604 (Ala.).

Under the Internal Revenue Act deductible expenses "incurred" or "accrued" are the subject of judicial decisions:

Bauer v. Commissioner of Int. Rev., 46 F. (2d) 874 (C. C. A. 6th);

Desco Corp. v. U. S., 55 F. (2d) 411.

These cases hold generally that "expenses" are not "incurred" during the taxable year unless the legal obligation to pay them has arisen.

We add another authority on the question of the word "incurred":

Dealtry v. Selectmen of Town of Watertown (Mass. 1932), 180 N. E. 621 (cited in Words & Phrases (Fourth Series), p. 320 et seq.)

The court denied that the selectmen incurred an excess liability by letting a contract for paving that might some day involve an expensive suit for infringement of a patent on paving materials.

On pages 22-25 of his brief counsel discusses at some length the distinction which might be made between the words "incur" and "accrue", but we feel that in so doing he is treading on very dangerous ground, in view of the language of the contracts and of Sec. 53 of our Banking Act. Counsel does not go so far as to say that interest which might or which might not accrue at some indefinite time in the future on the $60,500.00 note of July 1, 1931, could be con-

sidered in ascertaining the "present indebtedness" of the Lyon County Bank to The Reno National Bank on July 22, 1931. In our opening brief (pp. 41-45) we submitted at some length our views upon the question as to the meaning of this term "present indebtedness", and counsel has not seen fit to question our statements nor to cite any authority contrary to the cases referred to by us.

We believe that no court ever has held nor ever will hold that the expression "present indebtedness" will embrace future interest which may or may not accrue. It also seems to us that this is the crux of the receiver's entire case, for the reason that, if counsel is correct in his contention that future interest is not a "liability thereafter incurred", then under the express terms of the collateral agreements the assets were pledged merely and solely for the payment of the "present indebtedness" of the Lyon County Bank to The Reno National Bank as of July 22, 1931—and, if future interest is neither a "liability thereafter incurred" nor a "present indebtedness", then the receiver is most certainly barred by the contracts from asserting any claim whatsoever for interest.

At the bottom of page 22 of his brief, to support the logic of his argument with reference to the meaning of the word "incur" and of the expression "present indebtedness", counsel states that our argument would lead to the following conclusion:

> "If a man borrowed $10,000 on a note payable $1000 annually, and the maker of the note became insolvent at any time before full payment, the

> payee of the note could not collect for the installments accruing after insolvency, as the maker would contend that the remainder of the note was incurred thereafter. The reasonable construction would be that the indebtedness was incurred at the time of the signing of the note and would apply to any new indebtedness, but not to indebtedness accruing thereafter."

We do not understand the latter part of the last sentence of counsel's statement, but the paragraph as a whole clearly illustrates the fallacy of counsel's argument, for if a man gave a note for $10,000.00 that would certainly represent his "present indebtedness" as of the date of the note, although the annual installments would naturally become payable thereafter. This man's "present indebtedness" could be ascertained at any time by computing the actual balance then unpaid upon the note with interest already earned.

We have not at any time conceded, as stated by counsel on page 2 of his brief, that the "only" question of law involved in this case is whether or not interest can be paid on the note which the appellee holds after the insolvency of the Lyon County Bank. In our opening brief (page 3) we referred to this as the one major question of law, but naturally we do not waive the assignments of error contained in the transcript, pages 63-68, and in our opening brief, pages 13-14. Appellee does not dispute these other questions of law nor the facts upon which they are based, and we must therefore conclude that he concurs with our position in respect thereto.

This suit is neither governed nor affected by the National Bankruptcy Act or the National Bank Act or the Federal Reserve Act. The mortgage corporation stands in the shoes of an insolvent state bank. The receiver represents an insolvent national bank, but he might as well be an individual so far as the applicable law is concerned.

Preferences are forbidden by Sec. 35 of our Banking Act. The pledge of July 22, 1931, was for a pre-existing debt and was a badge of fraud. In *Dellamonica v. Lyon County Bank Mortgage Corporation,* 78 Pac. (2d) 89, the Supreme Court affirmed a finding that the Lyon County Bank was insolvent on September 10, 1931. It was undoubtedly insolvent or at least in a failing condition on July 22, 1931.

In the case of *Schramm v. Bank of Calif. N. A.,* 20 Pac. (2d) 1093, at page 1095, it is pointed out as admitted that the statute of Oregon (Sec. 22-802 Oregon Code 1930):

> "renders void a pledge made to secure a pre-existing debt, whether the indebtedness be due to a depositor or to any other creditor."

That statute is similar to Sec. 35 of the Nevada Act of 1911, except that the Nevada act is stronger by denouncing a preference by pledging "or otherwise".

Appellee cites, at page 21 of his brief, *Organ v. Winnemucca State Bank & Trust Co.* (Nov. 3, 1933), 26 Pac. (2d) 237. In our opening brief, at page 27, we cited the case of *Dellamonica v. Lyon County Bank*

Mortgage Corporation (April 5, 1938), supra. That later Nevada decision construed the same statute, and the court said:

> "Neither the case of Organ v. Winnemucca State Bank, 55 Nev. 72, 26 P. (2d) 237, or Lothrop v. Seaborn, 55 Nev. 16, 23 P. (2d) 1109, is controlling or analogous in the instant case."

Appellee has not commented on this decision.

On page 24 of his brief, with reference to Sec. 53 of our Banking Act, counsel states:

> "I have been unable to find much authority on this subject. My idea would be that no one has ever heretofore placed the construction on the statute that counsel try to place on it."

It would seem to us, however, that all of the available cases squarely sustain our contentions, even in the absence of a controlling statute. Our Sec. 53 enacted into statutory law the principle that interest cannot be allowed after the insolvency of the pledging bank. In fact, this very court, in *Douglass v. Thurston County,* 86 F. (2d) 899 (910), called attention to the scarcity of any rule or law which would support the contention of the present appellee, when it said:

> "In support of his contention in favor of the allowance of interest after the bank's insolvency, the treasurer relies upon a single decision—that of Washington-Alaska Bank v. Dexter Horton Nat. Bank (C. C. A. 9), 263 F. 304, 306, 307."

In the *Washington-Alaska* case the court found that the contract and security contemplated the con-

tinued payment of interest and rejected the contention that the Nevada Bank Act of 1909 had extra-territorial effect and governed the contract, but the *Douglass v. Thurston County* decision would seem to virtually overrule the court's previous holding in the *Washington-Alaska* case or at least to declare the latter as a sort of case apart. In any event emphasis was placed upon the fact that the *Washington-Alaska* case was the only one cited which could tend to support the treasurer's position, which was the same as that of the present appellee.

II. WHETHER THE RULE REQUIRING A RATABLE DISTRIBUTION TO CREDITORS PERMITS ANY CLAIM TO BE INCREASED AFTER INSOLVENCY.

In the case of the liquidation of an insolvent bank by this rule in most states creditors are entitled to an equal proportional share in the assets. Under the National Banking Act a ratable distribution is required under R. S. 5236, Title 12 U. S. C. A. Sec. 194. (See Note 122.) It involves distribution according to one rule of proportion applicable to all alike.

This is not a case of distribution. The creditor voluntarily (as in the case of *Gamble v. Wimberly,* 44 F. (2d) 329) elected to look to this security. However the rule will not be evaded by indirection. The "claim" remains the same, fixed and frozen by the oncoming of insolvency. The "obligation" is not always synonymous with the "claim".

Appellee cites the case of:

Ticonic National Bank v. Sprague, 303 U. S. 362-411, 82 L. Ed. 630 (Mar. 7, 1938). Appellee's Brief pp. 4-11 incl.

as authority under this phase of the question.

It appears from the *Ticonic* case, 303 U. S. 362; certiorari granted "limited to the question of interest" 302 U. S. 657; 90 Fed. (2d) 641 opinion on rehearing; 87 Fed. (2d) 365 first opinion (C. C. A. 9th) 14 F. S. 900 (D. C. May 29, 1936) that in March, 1931, the trust was created by Lottie Sprague in the original Ticonic Bank under provisions of the Federal Reserve Act authorizing the board to permit National Banks to act as fidicuaries:

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System.
>
> In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."
>
> Sec. 11(k) Federal Reserve Act, as amended (12 U. S. C. A. Sec. 248(k)).

The bank used the money in its business but set aside $20,000.00 in Denmark 6 per cent bonds to protect this and other trusts aggregating some $10,000.00.

In August, 1931, the original Ticonic bank sold out to the Peoples-Ticonic bank which after succeeding to the assets and obligations, failed in March, 1933. Arthur Picher became receiver of both estates.

Picher sold the Denmark bonds for $20,722.66 and held the money.

In 1935, Lottie Sprague sued the banks and receiver to have it declared that the bonds were held as security for their special deposit amounting to $3649.65. It was treated as a suit to assert the trust and enforce the statutory lien against the money received for the bonds. The trial court ordered the sum paid with interest from July 29, 1935, the date the petition was filed. (14 F. S. 900.)

The Circuit Court of Appeals finally affirmed the trial court's decision (90 Fed. (2d) 641, C. C. A. 9th):

> "It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid."
>
> Supreme Court opinion, 82 L. Ed. at 631.

This involves an assertion of a national bank rule applied to the facts in the *Ticonic* case, that the obligation was to pay interest, not from date of insolvency, but from date of suit, and not as commercial interest but as damages for delay in according a right. It involves the assertion that such damages were promised by the contract and assured by the statutory lien.

It is apparent why the statute was passed. Generally speaking, special deposits and trust funds are in danger of being lost through commingling, so that they may not be traced and thus will become available to general creditors. The statutory lien assures that they will be earmarked by setting aside, from the bank's general assets, bonds which cannot be reached by general creditors except as to excess.

The Supreme Court opinion points out that:

> "By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property 'in addition to their claim against the estate of the bank'. Section 11(k) of the Federal Reserve Act as amended."
>
> Supreme Court opinion, 82 L. Ed. 633.

It is not pretended and it does not appear that in the *Ticonic* case any "claim" was pursued against the "estate of the bank" in insolvency proceedings. No dividends were demanded. The statutory lien alone was looked to and the court enforced it by holding that it covered damages for delay.

The Supreme Court, speaking of "analogous cases" states that the rule for the payment of interest "up to the date of payment" has been followed in bankruptcy cases, in equity receiverships and "was applied to state banks in *Washington-Alaska Bank v. Dexter-Horton National Bank* (C. C. A. 9th), 263 Fed. 304, 306". (82 L. Ed. 633.)

The *Washington-Alaska* case found that the contract and security contemplated the continued payment of principal and interest and rejected the con-

tention that the Nevada Bank Act of 1909, giving priority to the claims of depositors, had extra-territorial effect and governed the contract. The dissent of Judge Ross makes this clear. It is also analyzed in the *Douglass v. Thurston County* case, supra. In the instant case the Nevada statute of 1911 operates at home. It governs the contract and it bars any lien for or the payment of any interest incurred after insolvency of a state bank.

The debtor in the *Ticonic* case was a National bank and the obligation secured did not bear interest. There was no law, as in Nevada, denying a lien for the payment of interest incurred after insolvency. The Federal law was directly to the contrary and granted a lien after insolvency, in plain terms. A contract of security was not restricted as in Nevada, but was enlarged and is further enlarged and construed by the Supreme Court in the Ticonic decision.

The Ticonic decision was not grounded on any right to compute interest on a secured debt after insolvency, but rather on a construction that the debt by the implied terms of the contract included damages for detention.

In this connection we call attention that the *Ticonic* case says nothing whatever as to the manner of collecting interest or the source, after insolvency, when the creditor looks to his security alone.

It does not appear that the Comptroller has "universally followed" the rule laid down in the *Ticonic* case, as appellee suggests on page 21 of his brief. Rather it appears that the Comptroller and the ap-

pellee are committed to the rule laid down in *Gamble v. Wimberly,* 44 F. (2d) 329.

The decision in the *Ticonic* case has been extant since March 7, 1938, yet has not been cited, to the point here urged by appellee, since that time so far as we can ascertain. And the decisions affecting the section of the Federal Reserve Act in question have been confined to the status of trust funds. See:

Haughney v. Gifford et al. (C. C. A. 3d), Feb. 1937, 88 F. (2d) 80,

where the receiver apparently at the instigation of the Comptroller of the Currency held that Sec. 11 (k) Title 12 U. S. C. A. Sec. 248 (k) did not apply.

First National Bank of Chattanooga v. Bell (C. C. A. 6th), June, 1938, 97 F. (2d) 683,

where a trust was upheld against the contention of the receiver and interest on outlays was allowed only to the date of the receivership, citing *Anderson v. Missouri State Life Ins. Co.* (C. C. A. 6th), 69 F. (2d) 794, and *White v. Knox,* 111 U. S. 784.

Way v. Camden Safe Deposit & Trust Co. (D. C. N. J. 1937), 21 F. S. 700,

upholding the receiver against the demands of one asking to be a substitute trustee.

Bobbitt v. Oxford Nat. Bank, 208 N. C. 460 (Sept. 1935), 181 S. E. 251,

where the claim was for a trust fund used by the bank in its business and protected by bonds pursuant to Sec. 11 (k) of the Federal Reserve Act. The appellate court reversed the trial court's holding that the claim was "neither a preferred or a secured claim". No

interest was claimed either from the date of the original deposit in 1928 or from the date of the security in 1932. The claim was paid simply as a preferred claim.

Appellee has cited as his authority for the allowance of interest following insolvency the case of *State ex. rel. Hansen v. Chelan County* (Wash.), 54 Pac. (2d) 1006. We assuredly do not consider this case in point. In the first place, there was no statute to bar the lien but, on the contrary, the Washington statute:

(1) required the payment of 2% interest on all moneys deposited;

(2) did not limit or prohibit the county treasurer from contracting for a greater rate than 2% in the event of insolvency; and

(3) authorized the bank to give such security for such deposits as are required by law or by the officer making the same.

The court in that case merely held that, by the express terms of the statute, the county treasurer was authorized to contract for and to collect interest at the rate of 6% after insolvency. This Washington case, however, is matched on the facts, and the decision is to the contrary, in the case of

Re: *American Bank & Trust Co. of Ardmore* (Okla.), 55 Pac. (2d) 470.

Citing *Michie on Banks,* Vol. 3, p. 329, 39 A. L. R. 457 (which is supplemented by 44 A. L. R. 1170).

III. WHETHER THE RULE REQUIRING A RATABLE DISTRIBUTION TO CREDITORS PERMITS A SECURED CREDITOR TO RETAIN ANY INTEREST COLLECTED FROM COLLATERALS OTHER THAN THE INTEREST ACCRUED AND COLLECTED FROM COLLATERALS AFTER INSOLVENCY—APPLYING ALL OTHER COLLECTIONS FROM THE COLLATERALS TO THE REDUCTION OF THE CLAIM, FOR PRINCIPAL ALONE, WITHOUT INTEREST.

This is the last part of appellant's major question of law and it is the first in point of treatment in appellee's brief. It concerns the mode or manner of obtaining interest on a secured obligation in state bank insolvency proceedings, if and when such a "new debt" is permitted under the Nevada law, promised under the Nevada contract of security and admissible against the general rule commanding that the distribution be ratable.

Appellant contends and has contended that the claim became fixed and frozen in the sum of the obligation remaining due on the day of insolvency and that no further charge by way of after-incurring interest could be allowed or paid under any pretext or in any manner whatever.

Appellee contended at the trial, in the pleadings and on the proof, and still contends, that the obligation as it stood on the day of insolvency may be increased by interest until entirely paid according to the manner and mode laid down by the decision in the case of *Gamble v. Wimberly,* 44 F. (2d) 329.

Appellee cites the above case on page 3 of brief and quotes it in part. The quotation is to the effect that under the facts and as an exception to the general rule interest on the obligation after insolvency might be "retained by the trustee".

But the court in the *Gamble* case went further and pointed out that the rule remained unchanged as to increasing the "claim" as the basis of "dividends" but could be avoided in practice if the creditor elected to look to the collaterals and capture interest on the obligation by retaining interest on the collaterals over a like period after insolvency. The court said:

> "Summarizing our conclusions, we find that, whereas the judgment of the lower court was correct in so far as it required the receiver to pay dividends ratably to the trustee based upon the latter's original claim, it was, nevertheless, in error in permitting the trustee to apply collections from collateral to the liquidation of interest, as the trustee did, and thereby to increase the amount, still unpaid, of his original claim by the amount of interest so liquidated. Although not required to do so, the trustee having in fact sold the collateral, and the total of all dividends paid and anticipated being much less than the full amount of his claim, he should apply in further liquidation thereof, not merely the balance of the proceeds realized from the collateral (as he has voluntarily done), but the total amount of such proceeds, less only any interest and dividends that may have accrued upon the collateral itself since the date of the Wilmington bank's insolvency.
>
> "Accordingly, the case must be remanded in order that the judgment may be modified in conformity with this opinion.
>
> "Modified and remanded."
>
> 44 F. (2d) 333-4.

We call attention to a difference in terminology. The original "claim" is the amount presently due on

proof in insolvency proceedings. "Dividends" are partial payments from time to time on the aggregate "claims". The "obligation" is the amount undertaken to be paid by the debtor. No dividends are paid on it when the creditor retains and looks to his collaterals rather than to "dividends".

It is certainly a far cry from appellee's present construction of the *Gamble v. Wimberly* case, as stated on page 3 of his brief, and as noted above, to the construction which has been at all times heretofore placed by both appellee and the Comptroller upon the decision in that case. The case is an interesting one, and no part of it is any more interesting or enlightening than the excerpts quoted by appellee on pages 3 and 4 of his brief. The facts in that case stated briefly and chronologically were:

Prior to October, 1929, First National Bank of Rocky Mount, North Carolina, later represented by Wimberly, trustee, loaned Commercial National Bank of Wilmington, North Carolina, $25,000.00 taking collateral security. On October 26, 1929, the trustee, Wimberly, sold the collaterals for $23,331.30. On December 29, 1929, the trustee had the additional sum of $3402.90 on deposit with Commercial National and on that day Commercial National failed and Gamble was made receiver.

Receiver Gamble paid two dividends of 7½% each and Wimberly received $4260.44 on his claim for $28,402.90.

When the time came to pay a third dividend Gamble proposed to debit Wimberly with the collections and

the dividends and pay the balance of $811.16 by ratable dividends on the original claim for $28,402.90.

Wimberly protested that the original "claim" was $28,402.90 but that the interest on that was $2372.89, making a total of $30,775.79; that it was reduced by dividends of $4260.44 and total collections from collaterals of $23,331.30 or by a total of $27,591.74, leaving a balance unpaid of $3194.05.

The variance between the parties was the difference between the $3184.05 claimed by Wimberly and the $811.16 conceded by Gamble or $2372.89 the interest in dispute.

The trial court ruled that dividends in all cases should be based on the original claim of $28,402.90 without any increase by way of interest but it held that Wimberly was entitled to future dividends on that sum until he should receive the amount he claimed, to-wit: $3184.05. In other words out of the collections from collaterals amounting to $23,331.30 he required Wimberly to credit on the face of the original claim $20,958.41 only and permitted him to retain the balance $2372.89.

Gamble appealed and the appellate court sustained the trial court in the ruling that the claim did not grow with interest, but found that on the obligation Wimberly was entitled to retain such interest as he collected from the collaterals after insolvency. The court however was not satisfied that the sum in question $2372.89 was the correct sum and therefore remanded the case for determination on that point alone.

It was foreshadowed that this sum would not be allowed to be retained. This appeared by reason of the fact that Wimberly sold the collaterals before the day of insolvency and not after. It was foreshadowed that in the end Wimberly would be required to credit this $2372.89 on the face of the claim. Thus Gamble's contention seemed destined to prevail so that all that would remain due would be $811.16.

The instant case narrows down to a question of fact. If any interest is to be taken into consideration at all in this case, it must be the interest actually collected from the collaterals after insolvency.

Appellee fixed this sum in his pleadings at $14,-658.84; Answer Par. III, IV, Tr. p. 24; at another time $5182.92; at another time $23,118.97. See page 39, transcript. In Finding IV the court found this sum to be $2930.75 and in Finding V to be $14,658.84, all these amounts running to October 21, 1936, from February 16, 1932. (Tr. pp. 57-58.)

As heretofore explained, if that rule were applied in the instant case, the appellee would be allowed $2930.75 as the interest actually accrued and collected from the collaterals after insolvency.

Appellee quotes from *Sexton v. Dreyfus,* 219 U. S. 345, 55 L. Ed. 244, on pages 3, 4 of brief. This is in conflict with *Gamble v. Wimberly* on which appellee relies, because *Gamble v. Wimberly* is based on the National banking law.

> "However, we are concerned here, not with the winding up of a private corporation, but with a national bank; and it has long been settled that

> the national banking laws, part of which have been above quoted, govern any distribution of the assets of an insolvent national bank, and that its provisions are not to be departed from, anything in the bankruptcy law to the contrary notwithstanding. Cook County National Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537."
>
> Opinion 44 F. (2d) P. 331, top of col. 1.

Appellee seems to cite the *Ticonic* case, 303 U. S. 362-411 (Brief p. 4), as bearing on the manner and mode of payment in cases where the creditor looks to his collaterals, but that case is entirely devoid of reference to the manner of payment. There were no dividends; there was no earning power of the collaterals. The money with the penalty was ordered surrendered in a lump sum as a trust fund and even the penalty or damages was computed only from date of petition and not from date of insolvency. While the *Ticonic* case may shed light on the right to make a new debt after insolvency, it sheds no light whatever on the question here in view.

Appellee questions our statement as to the holding in:

> *U. S. Fidelity & Guaranty Co. v. Malia, Bank Commissioner,* 49 P. (2d) 954 (Utah).

It appears quite clear that in that case the court in review sustained the defendant's demurrer and applied the Bankruptcy rule as contended for by the defendant as against the equity rule as contended for by the plaintiff. The assigned "claim" for the deposit and the claim for the uncollected balance did not include

any claim for after-accruing interest. The court cited the Utah statute against preferences as follows:

> "R. S. Utah 1933, c. 2, tit. 7, provides for the suspension and liquidation of banking institutions. Section 7-2-15 provides that 'no preferences or priorities shall be given to any claim,' except those incurred in liquidating the affairs and those otherwise provided by law. This section enumerates certain claims which are to be given preference and provides that such claims shall be paid in full before 'any payment shall be made upon the claims of depositors and other general creditors of such bank.' "

See opinion 49 P. (2d) at 956, col. 2.

Appellant pointed this out in brief pp. 36-37.

The decision states the bankruptcy rule with respect to the "claim" not the claim augmented by interest, in the light of the state statute proscribing preferences.

It might be well at this point to sum up the situation as it is now presented, based upon the pleadings, the undisputed evidence and the briefs heretofore filed.

This action was instituted by the mortgage corporation upon the "straight-up" theory that under the terms of the Nevada statute (particularly Secs. 3J and 53 of the 1911 Banking Act) and of the collateral agreements (Exhibits B, C and D attached to the plaintiff's complaint, Transcript pp. 16-21) the mortgage corporation was entitled to all collections made by the receiver in excess of the amount due on the $60,500.00 note on February 16, 1932, when the Lyon

County Bank failed, and also to the return of the remaining securities.

The receiver in his answer admitted the amount of the collections to have been as alleged by the mortgage corporation, but denied as a conclusion that the indebtedness had been fully paid, and alleged, by way of justification for the retention of the excess (Transcript, p. 24), that the receiver had collected as interest on the pledged assets the sum of $14,658.84, which he had applied as interest on the main obligation, and that there was still a balance owing on the main obligation of $9316.94 as of October 21, 1936.

At the trial the receiver called but one witness (his bookkeeper, Mr. Butler), and the only testimony sought to be elicited from him was as to the amount of interest collected on the pledged assets and, incidentally, the application of interest payments and the amount due on the main obligation, all based on the so-called revision.

In addition to this, counsel for the receiver introduced in evidence (Defendant's Exhibit A, Transcript p. 94) a letter from one Kit Williams, Executive Assistant Counsel Comptroller of the Currency, addressed to the receiver under date of December 16, 1936, outlining the application which should have been made of the moneys received by the receiver and stating that "you should have applied toward the interest due on your bills payable obligation the income accrued upon and collected from the pledged assets after the date of closing of the Lyon County Bank", etc., and citing the rule to be followed as

stated in the case of *Gamble v. Wimberly,* 44 F. (2d) 329.

In the receiver's brief submitted to the trial court he stated that it "may be readily conceded" "that we are governed in this case by the laws of the State of Nevada".

In the decision of the court (Transcript pp. 41-48) the judge recognized the major issue presented when he said:

> "Questions of law presented upon the facts of this case are whether the amount of indebtedness of the Lyon County Bank to the Reno National Bank is finally determined as of the date of insolvency of the Lyon County Bank and its taking over by the State Bank Examiner and thereafter no interest would accrue thereon, which is the contention of complainant, or whether, where such indebtedness is secured by interest bearing pledges, interest derived therefrom may be applied in discharge of interest which does accrue thereon, which is the contention of defendant."

The court reached the conclusion that the receiver was entitled to retain interest earned and collected upon the pledged assets subsequent to the date of insolvency of the Lyon County Bank but made conflicting findings as to the amount of such interest.

In paragraph IV he found the amount of such interest earned and collected to have been $2930.75, which is the correct amount as shown by the evidence. In paragraph V he found the amount to have been $14,658.84, which has no basis in the evidence, as the sum testified to by the receiver's witness, Mr.

Butler, was $23,118.97 (Transcript p. 112), and he explains that (Transcript p. 113) he had "never made a compilation, split as to the date February 16, 1932 (date of suspension of Lyon County Bank) as to the interest actually accruing on this underlying security after the Lyon County Bank closed February 16, 1932,—or as to interest which accrued after that date and was collected after that date by Mr. Tobin". Mr. Butler mentioned the sum of $14,658.84 but stated that it was not correct except under the "revised set up", and even then this figure had reference only to the accumulated interest on the main obligation and had no connection whatever with the interest collected on the pledged assets. This figure of $14,658.84 was apparently taken by the court (Transcript p. 42) from what he says the defendant by its answer "admits" having collected.

There is no evidence whatever as to the amount of interest earned upon the pledged assets subsequent to February 16, 1932, and collected by the receiver, except the testimony of the receiver himself as a witness for the mortgage corporation (Transcript pp. 76-91), which shows conclusively that the sum of $2930.75 specified in the court's finding number IV was correct. In his brief submitted to this court the receiver's counsel does not even question the correctness of this finding.

In the original findings prepared by receiver's counsel (Transcript pp. 49-52) the only authority which counsel claimed or the court (by signing the findings) recognized for the retention of any part of the moneys collected by the receiver in excess of

the face of the claim as it existed on February 16, 1932, was by virtue of the fact that "the sum of $14, 658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank".

In the court's findings of September 8, 1938 (Transcript pp. 55-60) the trial court further emphasized the same principle as his ground for deciding in the receiver's favor.

From the foregoing it will be observed that every move made in this case from the time of its inception, whether it be by way of pleading, evidence, argument or decision, has been with the one principal motive of determining whether, on the one hand, under the pledging agreements and the Nevada statute, the receiver is barred from claiming any interest, or, whether, on the other hand, he may have the benefit of the interest accrued and collected by him on the pledged assets following the closing of the Lyon County Bank.

Now, however, receiver's counsel seems to have abandoned everything that has gone before and to have taken the position evidenced by two sweeping statements appearing, respectively, on pages 3 and 11 of his brief, as follows:

> "Under the authority immediately cited, we need not depend on the avails or interest or dividends collected on the pledged securities for the payment of the interest and principal until both have been paid in full, but we may apply any payments of whatsoever kind or character to the payment of principal and interest."

> "There is no chance to misunderstand the law under the manifestation of the last decision of the Supreme Court of the United States on this question. We are entitled to payment of principal and interest in full from the proceeds of the collateral, be it principal or interest or dividends."

He does not in any way attempt to justify the so-called revisions made by the receiver after the mortgage corporation had demanded an account, nor does he seem any longer interested in the question of what interest was earned and collected upon the pledged assets following the insolvency of the Lyon County Bank, but passes these things off with the following casual observation appearing on page 26 of his brief:

> "If appellee is entitled to payment of interest accruing after insolvency of the Lyon County Bank, then there would be no point in arguing as to what amounts of interest arose from the collection of interest on the securities or the application of payments."

Counsel, however, does devote several pages of his brief to an analysis of certain cases cited on pages 32-39 of our opening brief, calling repeated attention to the fact that "no question of interest after insolvency was involved", etc. The court will observe, as counsel failed to do, that these cases were all cited in support of the proposition that "the Nevada Act of 1911 is inclusive of the whole banking subject and exclusive of all other law, state or federal". If any of the cases cited (and analyzed by counsel) had involved the question of interest on a secured claim

after insolvency of the debtor, it would have been purely a coincidence.

We pointed out in our opening brief that "the Nevada Act of 1911 is inclusive of the whole banking subject and exclusive of all other law, state or federal", so far as this case is concerned, and we also pointed out that "the Nevada law is founded on the police power" and that "contracts are made in the light of existing law and police power and the law becomes part of the contracts". Neither of these propositions is questioned by counsel and we assume that they may be conceded.

In conclusion we summarize:

1. The Nevada law denies any lien for any liability or payment incurred after insolvency known to the creditor.

2. The Nevada law is written into any contract of security for the payment of interest incurred after insolvency.

If the pledge was given for pre-existing principal and interest, it is void.

If it was given to cover interest after insolvency it is barred by law.

If appellee is correct in his contention that future interest is not an indebtedness or liability "thereafter incurred", then regardless of the statute the contracts here expressly bar the claim for any interest, as certainly future interest which might or might not accrue was not a part of the "present indebtedness" on July 22, 1931.

3. Interest is not secured, because the security contract is not in conformity with any valid agree-

ment to secure interest. To that extent it is unsecured and must yield to the rule requiring a ratable distribution.

4. A "claim" in insolvency proceedings, made as the basis for dividends, is fixed when filed on insolvency and is not to be enlarged by interest computed after insolvency. If interest is to be captured when the creditor looks to his collaterals it must be taken, not by enlarging the claim, but by retaining an appropriate amount from the interest on the collaterals retained, confined solely to the interest after insolvency. All other collections must be credited upon the face of the obligation.

Appellant denies interest in any event because it is not secured pursuant to the Nevada law.

Appellee claims the interest as "secured" because it was "nominated in the bond" and rejects the Nevada law.

Appellee claims that the manner and mode of capturing the interest on the obligation after insolvency, to the disregard of "dividends" on his "claim", is by retaining the interest collected after insolvency on the collaterals retained by him. Appellee's theory in the pleadings, at the trial, under the Comptroller's directions, and in the briefs has been that he is bound to credit all collections against the face of his claim or obligation, whether they be principal or interest collections, less only such collections of interest on the collaterals as were earned after insolvency. This is the theory of *Gamble v. Wimberly* upon which appellee has relied from the beginning. This is the sole question of fact tried.

Aside from the law, on which appellant still stands, appellant points out that appellee does not dispute the facts stated in appellant's brief. Appellee has not established that the collections of interest on the collaterals after insolvency and up to October 21, 1936, exceeded $2930.75 as set forth in the trial court's finding IV at page 58 of the transcript. Appellee has not impaired the statement of facts contained in proposed finding VI filed by complainant-appellant the 11th day of August, 1938, appearing at page 136 of the transcript in the bill of exceptions. Appellee has not justified in any manner the court's finding V at page 58 of the transcript fixing the amount purported to have been collected as interest on the collaterals after insolvency at $14,658.84. Appellee has not explained the use of the words "present indebtedness" in the contract.

Appellee does not discuss the evidence. He concedes the facts as we claim them. He asks that *Gamble v. Wimberly* be applied. This alone is tantamount to confessing error and for that error and other errors assigned we ask that the judgment be reversed and corrected and that speedy justice be done to the appellant aggrieved herein.

Dated, Carson City, Nevada,
March 20, 1939.

Respectfully submitted,
GEORGE L. SANFORD,
A. L. HAIGHT,
Attorneys for Appellant.

No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 5

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),

Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Carson City, Nevada,
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Fallon, Nevada,
Attorneys for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

Cases

Statutes

the United States for the District of Nevada, appealed from, was affirmed.

That in affirming said judgment this court inadvertently omitted to consider certain points of law and fact presented by the appellant on said appeal, which if given due consideration would have required the reversal of said judgment, with or without order for new trial.

That in affirming said judgment this court inadvertently adopted the findings of fact and conclusions of law of the trial court, except for one modification leaving the matters thus adopted as adjudicated, precluding further litigation to clarify the same, whereas the matters thus found and adjudicated are erroneous.

And in this connection appellant further represents and shows, as follows:

Speaking of the collateral security furnished by Lyon County Bank July 22, 1931, this court in its opinion, says:

> "The security thus provided was not, as to subsequently accruing interest or otherwise, diminished or impaired by Lyon Bank's insolvency or by the action of the examiner in taking possession of its property and business. Ticonic National Bank v. Sprague, 303 U. S. 406,411."

The opinion fails to give effect to Section 53 of the Nevada Bank Act of 1911, Nevada Compiled Laws, Section 702, which prohibits a "lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets

of the bank whose property and business the examiner shall have taken possession * * *'' and the court accounts for this failure by stating:

> ''There is, apparently, no pertinent Nevada decision. Lacking such, we apply the rule of Ticonic National Bank v. Sprague, supra.''

In the footnote to this part of the opinion this court lists the cases cited by appellant on the point under consideration, as follows:

> ''State v. Parkinson, 5 Nev. 15; State v. Wildes, 37 Nev. 55, 139 P. 505, 142 P. 627; Gill v. Paysee, 48 Nev. 12, 226 P. 302; Tonopah Sewer & Drainage Co. v. Nye County, 50 Nev. 173, 254 P. 696; Organ v. Winnemucca State Bank & Trust Co., 55 Nev. 72, 26 P. 2d 237; Lyon County Bank v. Lyon County Bank, 57 Nev. 41, 60 P. 2d 610; Dellamonica v. Lyon County Bank Mortgage Corp., ... Nev. ....., 78 P. 2d 89; Crystal Bay Corp. v. Schmitt, ... Nev. ....., 81 P. 2d 1070; Id., ... Nev. ....., 83 P. 2d 464.''

In the opinion the court says that in these cases ''The question was not involved, decided, considered or discussed.''

It is upon the foregoing postulate that this court had recourse to the rule of *Ticonic National Bank v. Sprague.*

It may be conceded that there is no Nevada decision specifically holding that, under Section 53 of the Nevada Bank Act of 1911, after the bank examiner takes possession of a bank, no person knowing of such taking shall have a lien or charge for any liability

thereafter incurred, for the simple reason that such is the plain meaning of the statute.

But there is a Nevada decision which squarely holds that interest constitutes no part of the original demand and it therefore follows that the interest on the Reno National bank loan was "thereafter incurred" and comes directly under the provisions of the statute.

The case of State v. Parkinson (cited in appellant's opening brief, pages 44 and 45), 5 Nevada, 15, at page 28 holds that "interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

Furthermore we submit that before this court should say "There is, apparently, no pertinent Nevada decision," and thus dismiss the question for the purpose of resorting to federal decisions, this court should recognize that there is a Nevada statute on the question and interpret or construe the same. We find no attempt by this court, before taking the easier way, to draw a line of distinction between the incurring of a charge or liability and the original contract to discharge it if and when it is incurred. A liability for interest is incurred when it is earned. Certainly it is not incurred before it is earned.

For the purpose of assisting this court to interpret the Nevada statute appellant in the reply brief, page 4, quoted from the *City of Louisville v. Fidelity & Columbia Trust Co.* 54 S.W. (2) 40, 245 Ky. 704, and on page 5 from *Bank of Indian Territory v. Eccles,* 91 P. 695-697.

The opinion also states:

> "Appellant does not challenge the validity of Lyon Bank's note or of the pledges securing it."

If the court will refer to paragraph II of the answer (Tr. p. 24) it will be observed that the Reno Bank alleged that the securities in question were hypothecated "to secure the payment of said note." Paragraph II of our reply (Tr. p. 29) reads: "Complainant denies the matters in paragraph II." furthermore, there is nothing whatever in the record to indicate that the securities were pledged for the payment of the $60,500. note, and we have at all times denied that the securities were pledged for the payment of this note and in our briefs we have argued that they were not so pledged.

The opinion further states:

> "Appellant concedes that Reno Bank and appellee, as its receiver, could lawfully apply the proceeds and avails of the pledged collateral to the payment of the principal ($59,543.64) and accrued interest ($605) which were due and owing on the note when the examiner took possession of Lyon Bank's property and business on February 16, 1932."

We have not conceded this except under the theory that interest accruing after July 22, 1931, was a liability thereafter incurred, and we have at all times strenuously argued that, if the court should hold that such accruing interest was not a "liability thereafter incurred," then the securities were pledged merely for the payment of the "present indebtedness" of the

Lyon Bank to the Reno Bank on July 22, 1931, which could only include interest computed to that date.

There is no doubt in our mind that under the law of this state, as declared by our supreme court (State v. Parkinson, 5 Nev. 15) and by legislative enactment (Sec. 53 of the Nevada Bank Act of 1911, N.C.L. 702), the interest on the $60,500 note which accrued after July 22, 1931, was a liability thereafter incurred and that any lien for such interest as might have accrued after February 16, 1932, was absolutely barred.

Our Supreme Court, in *State v. Parkinson,* supra, stated unequivocally and unqualifiedly as follows:

> "Interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

In other words, when the delay occurs the liability is incurred. However, this court has not seen fit to recognize the rule laid down by our supreme court, but states that Section 53 of the Banking Act does not apply because "the liability was incurred long before the examiner took possession" and "no part of it was incurred thereafter." While we emphatically disagree with this conclusion, nevertheless, by so holding, this court is absolutely limited by the terms of the contract to finding that the securities were pledged solely for the "present indebtedness" of the Lyon Bank to the Reno Bank as of July 22, 1931. The court then apparently disposes of this feature by saying: "The pledges were made expressly to secure all indebtedness of Lyon Bank to Reno Bank." This of

course cannot follow nor be true, but upon this premise the court, without so stating, decides that "present indebtedness" included interest as well as principal, and interest accruing after February 16, 1932, as well as that accruing previously.

If the court feels that the term "present indebtedness" can be given such a broad construction (and we know of no prior authority therefor), why was it deemed advisable to state that "the pledges were made expressly to secure all indebtedness of Lyon Bank to Reno Bank;" it will be noted that the vital word "present" was omitted.

At present it is impossible for us to reconcile the decision of this court that "no part of it (indebtedness based upon accruing interest) was incurred thereafter" with the holding of our own supreme court that "interest * * * it simply a statutory allowance for delay." Nor can we reconcile this court's holding that the liability for interest accruing after February 16, 1932, was incurred "long before the examiner took possession (undoubtedly meaning by the signing of the note on July 1, 1931)" with our own supreme court's holding that "interest constitutes no part of the original demand."

In addition to the objection that the court forsook the Nevada law without making an attempt to apply it, and took recourse to the federal decisions, appellant represents that the court failed to give due consideration to the objection made to the so-called revisions and reallocations made in the instant account.

The opinion declares:

> "The total amount due on Lyon Bank's note on February 16, 1932, plus interest subsequently accruing thereon, exceeded the total amount collected by Reno Bank and appellee. This is true even though all sums collected were, or may be deemed to have been, applied to the payment of principal until all principal was paid. Therefore, we need not consider appellant's contention that certain payments which appellee treated as payments of interest should have been treated as payments of principal."

In other words the revision is immaterial and harmless. As a fact the revision works grievous harm and actual monetary loss to the appellant. The receiver's witness Butler (auditor) testified in response to a question by the trial court:

> "On the original manner in which the amounts were applied there is a balance due on the Lyon County Bank note, of one dollar principal and $6825.47 interest,—and on the revised application there is due $9318.94 (principal) and interest from October 21, 1936." (Tr. p. 114.)

It will be borne in mind that the Reno bank held certain securities of the Lyon Bank consisting of bonds and notes, many of the latter secured by mortgage in connection with their loan; we will term these underlying securities or collateral. It collected payments from the makers from time to time and credited such payments upon these securities and simultaneously credited a corresponding payment upon the principal note of $60,500; i.e. when the payment was

credited upon the principal of the underlying security a similar amount was credited upon the principal of the $60,500 note. The Reno Bank generally credited the major portion of the payments upon the principal of the underlying securities and likewise credited a similar payment upon the principal of the main note due it thereby reducing in every instance the principal of the underlying obligations and carrying charges and also the principal of the $60,500 obligation and carrying charges. (The amount credited to interest during the period from February 16, 1932, until October 21, 1936, exceeded the amount of interest which accrued and was collected upon the underlying securities during that period of time.) As a result of these original credits upon the underlying securities and the principal note on October 21, 1936, there remained due, in accordance with the books of the Reno Bank and its advices to the Lyon Bank, the sum of $1 unpaid upon the principal and $6825.47 unpaid interest upon the note for $60,500. These amounts reflected the credits and settlement made by the Reno bank with the holders of the underlying securities. (Tr. p. 114.)

After October 21, 1936, the Reno Bank made a so-called revision of the credits in which instead of crediting largely the payments upon the principal of underlying securities and in each instance with a similar credit upon the main obligation of $60,500, it applied the payments to the discharge of the interest and thereafter to the payment of principal. The result of the revision is shown by the testimony of

the auditor of the Reno Bank (Tr. p. 114) to be that on October 21, 1936, the Lyon Bank owed the Reno Bank $9316.94 upon the principal (while the original figures were $1 upon the principal as of October 21, 1936, and $6825.47 accumulated and unpaid interest). The principal balance as of October 21, 1936, being $1 under the original credits given, and $9,316.94 under the so-called revision. Unpaid principal bears interest; interest cannot be compounded in Nevada.

Based upon these figures of the Reno Bank the so-called revision results in an actual minimum loss to the Lyon Bank of $2490.47.

It will be remembered that the Reno bank held these underlying securities and that these securities were settled and liquidated upon the basis of the original credits made by the Reno Bank and then the notes and securities were delivered to the makers. When any payment made upon underlying securities was credited upon principal of underlying securities a similar credit upon principal of the main security of $60,500 was given. It will easily be seen that if the payments as made were credited upon accumulated interest (as the revision does) instead of principal as originally followed by the Reno Bank then the Lyon Bank would suffer by the revision of credit, and the makers of the original underlying securities would receive the benefit. This method of crediting upon the underlying securities and reflecting similar credits upon the principal note of $60,500 is well illustrated in the Carter case. (Tr. p. 109.) The Reno Bank settled the balance of the Carter note for $873.05 but

under the revision the Reno Bank says the actual amount due upon the Carter note at the date of settlement under the new theory was $1625.99. The Carter note was returned to the makers by the Reno Bank and now the Lyon Bank must pay the difference between $1625.99 and $873.05 to the Reno Bank. It will readily be seen that if the methods finally adopted by the Reno Bank had been originally followed by it on the Carter note the sum of $1625.99 would have been collected from Carter as a final balance instead of $873.05 and that now the Lyon Bank must actually pay to the Reno Bank the difference which amounts to $752.94. Other securities were likewise liquidated and settled by the Reno Bank according to Mr. Tobin, receiver, and in order to build up the principal balance as shown by the revision the credits and amounts were changed long after the securities were returned to the makers. (Tr. pp. 107-8.) In each instance the Lyon Bank, if this revision is proper, must now pay the amount added by this revision and it cannot look to the underlying securities held by the Reno Bank, as the Reno Bank has settled the same and put them beyond the reach of the Lyon Bank. According to the figures of the Reno Bank the actual minimum loss suffered by the Lyon Bank is $2490.47 as of October 21, 1936.

The Lyon Bank adopted the original method followed by the Reno Bank and it has always opposed the revision. It therefore is beyond controversy that the Lyon Bank, a small country bank, which will pay less than fifty cents on the dollar to its creditors, is

vitally injured by this so-called revision through moneys which have been lost to it (assuming that the revision had some substance of right) by the actions and acts of the Reno Bank.

We further submit that payments made and credited cannot be changed except by the mutual consent of the parties. (Appellant's Opening Brief pp. 56-63 inc.)

Attention is also called to the fact that in the final findings of the trial court (Tr. p. 59) no reference is made to a surrender or accounting for the collaterals for which the credits are responsible. In the complainant's proposed findings (Tr. p. 137) we asked for the return of the Wedertz notes amounting to "$2296.90 or thereabouts" (correct $2246.90). If these are not ordered returned they should be ordered accounted for.

The pertinency of these observations lies in the fact that the original suit was begun by the successors to the state bank not against the national bank as an insolvent, but as a creditor and trustee. The judgment is that the complainant take nothing. But the findings will be a perpetual memorial and establish the fact that certain matters were actually litigated and determined, and this determination will harass the Lyon Bank in its subsequent working out of the contractual relation involved and no doubt be considered as final.

The statement in this court's opinion that the revision is immaterial or, as suggested during the oral

argument that it is of advantage to the Lyon Bank, is not correct because the figures—the ultimate result—show a spread of consequence to the great loss to appellant.

In conclusion we submit:

(1) That the securities in question were not pledged for the payment of the promissory note of July 1, 1931, but were expressly pledged for (a) the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931, and (b) all of the future indebtedness to the Reno Bank which the Lyon Bank might thereafter incur;

(2) That this court cannot properly say that after-accruing interest is not a "liability thereafter incurred," in the face of our supreme court's holding that interest "is simply a statutory allowance for delay";

(3) That, if after-accruing interest constitutes a "liability thereafter incurred," it is barred by Section 53 of the Banking Act from and after February 16, 1932;

(4) That this court cannot properly say that after-accruing interest was a part of the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931, in the face of our supreme court's holding that "interest constitutes no part of the original demand";

(5) That, if this court is correct in holding that subsequently-accruing interest is not a "liability thereafter incurred," then absolutely the only func-

tion of the promissory note of July 1, 1931, in this litigation is for use in ascertaining the "present indebtedness" of the Lyon Bank to the Reno Bank on July 22, 1931;

(6) That under the express holding of our supreme court the interest for which the Reno bank receiver may claim a lien against the pledged collateral must cease on February 16, 1932, and, if, as held by this court, subsequently-accruing interest is not a "liability thereafter incurred," then the interest for which the Reno Bank receiver may claim a lien against the pledged collateral must cease on July 22, 1931;

(7) That we consider it a matter of right on our part as counsel to take exception to the court's statement of our position in this litigation;

(8) That we consider it a matter of right on the part of the appellant that its status be determined strictly according to the terms of the collateral agreements dated July 22, 1931;

(9) That we consider that this court should quote in its final decision the hereinabove-quoted portion of the decision of our supreme court in *State v. Parkinson,* supra, and which was set out and emphasized in our brief and that this court should explain why such a holding of our supreme court is not controlled in this case;

(10) That the so-called revision of credits changed the position and status of the parties and that it causes an actual monetary loss to appellant due to the actions of the respondent. That respondent vol-

untarily adopted a method of credits upon underlying and the principal security and to allow a change to the so-called "revision" injures appellant entirely as the result of the acts of respondent.

Dated, Carson City, Nevada,
July 7, 1939.

Respectfully submitted,
A. L. HAIGHT,
GEORGE L. SANFORD,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I do hereby certify that I am of counsel for the appellant in the foregoing entitled cause and that in my judgment the foregoing petition for rehearing and stay of mandate is well founded and that it is not interposed for delay.

Dated, Carson City, Nevada,
July 7, 1939.

GEORGE L. SANFORD,
Of Counsel for Appellant and Petitioner.

No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

ERNEST F. GANAHL,

Appellant,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association and J. V. HOGAN, Receiver, Intervenor,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

ERNEST F. GANAHL,

Appellant,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association and J. V. HOGAN, Receiver, Intervenor,

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

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UNITED STATES OF AMERICA, ss.

To ANAHEIM FIRST NATIONAL BANK, a National Banking Association, JOHN DOE COMPANY, a corporation, JOHN DOE ONE, JOHN DOE TWO, and JOHN DOE THREE, J. V. HOGAN, Receiver, Intervenor, Greeting:

You are hereby cited and admonished to be and appear at a United States *Circuit of* Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24th day of August, A. D. 1938, pursuant to Order Allowing Appeal filed on July 25, 1938 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 7522-J (in Law) WHEREIN L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY are Appellants, and you are appellees to show cause, if any there be, why the Decree, Order or Judgment in the said Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES United States District Judge for the Southern District of Cali-

fornia, this 26 day of July, A. D. 1938, and of the Indepence of the United States, the one hundred and Sixty-*Second.*

Wm P. James
U. S. District Judge for the Southern District of California.

Service of a copy of the foregoing Citation is Acknowledged this 4th day of August, 1938.

Dockweiler & Dockweiler
& Benjamin Chipkin
by Henry I. Dockweiler
Attorneys for Appellee Anaheim First National Bank.

[Endorsed]: Filed Aug. 4, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

L. J. KELLY; F. H. DOLAN; BEN BAXTER; S. JAMES TUFFREE; ED KELLY; F. A. YUNGBLUTH; MINNIE PALMER, formerly known as Minnie Baxter; M. DEL GIORGIO; JENNIE POMEROY; J. W. TRUXAW; J. J. DWYER; M. E. DAY; ERNEST F. GANAHL; FRANK BAUM and JOSEPHINE BAUM, husband and wife, Plaintiffs, vs. ANAHEIM FIRST NATIONAL BANK, a national banking association; JOHN DOE COMPANY, a corporation; JOHN DOE ONE; JOHN DOE TWO; and JOHN DOE THREE, Defendants.	COMPLAINT FOR MONEY AND TO CANCEL WRITTEN INSTRUMENTS

Plaintiffs complain of defendants and for cause of action allege:

I

That F. K. Day is dead and that prior to the commencement of this action the plaintiff, M. E. Day, succeeded to all of the right, title and interest of the said

F. K. Day in and to his claim herein sued upon, and that the said plaintiff, M. E. Day, is now the owner and holder thereof.

II

That at all times herein mentioned the plaintiffs, Frank Baum and Josephine Baum, have been and now are husband and wife; that the plaintiff, Minnie Palmer, was formerly known as Minnie Baxter.

III

That the defendant, Anaheim First National Bank, is a national banking association organized under the statutes of the United States known as the National Banking Act; that the said Bank has its place of business in Anaheim, Orange County, State of California; that the said Bank was declared insolvent by the Comptroller of the Currency of the United States of America on the 15th day of January, 1934 and that on that date the said Comptroller of the Currency appointed J. V. Hogan as Receiver of the said Bank, and that ever since the said time the said J. V. Hogan has been and now is acting in the performance of his duties as Receiver of the said Bank.

IV

That on or about June 18, 1931, a depreciation existed in the bond account of the said defendant, Anaheim First National Bank; that at said time the aforesaid F. K. Day and all of the plaintiffs herein, except the plaintiffs, M. E. Day and Josephine Baum, were shareholders in the said Bank; that on or about the said June 18, 1931 the said F. K. Day and all of the plaintiffs herein, except the plaintiffs, M. E. Day and Josephine Baum, together with other shareholders of said Bank, entered into an

agreement with the said Bank whereby the said other shareholders of the said Bank and the said F. K. Day and all of the said plaintiffs herein, except the said plaintiffs, M. E. Day and Josephine Baum, agreed to purchase from the said Bank the said depreciation then existing in the said bond account; that by the terms of the said agreement the said Bank agreed to pay, from time to time to the aforesaid parties who so entered into the aforesaid agreement with the said Bank any prorata decrease which might from time to time appear in the said depreciation of the said bond account of the said Bank.

V

That in said agreement the said plaintiff, L. J. Kelly, agreed to pay to the said Bank the sum of $4,900.00 and that pursuant to the said agreement said plaintiff, L. J. Kelly, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, L. J. Kelly, by the said Bank.

VI

That on or about January 15, 1934 the said J. V. Hogan, as Receiver of the said Bank, as aforesaid, took possession of all of the assets of the said Bank, including the said bond account, and liquidated the same.

VII

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, L. J. Kelly, to the said Bank of the said sum of $4,900.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank has become

and is now indebted to the said plaintiff, L. J. Kelly, in the said sum of $4,900.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

VIII

That on or about May 31, 1934 the said Comptroller of the Currency published his notice requiring all persons having claims against the said Bank to present their said claims to the said J. V. Hogan, as Receiver, as aforesaid, with the legal proof thereof within three months from the said May 31, 1934.

IX

That on or about August 23, 1934 said plaintiff, L. J. Kelly, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $4,900.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, L. J. Kelly, and that the said plaintiff, L. J. Kelly, is now the owner and holder thereof.

FOR A SECOND COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, F. H. Dolan, agreed to pay to the said Bank the sum of $32,500.00 and that pursuant to the said agreement said plaintiff, F. H. Dolan, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, F. H. Dolan, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, F. H. Dolan, to the said Bank of the said sum of $32,500.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank has become and is now indebted to the said plaintiff, F. H. Dolan, in the said sum of $32,500.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, F. H. Dolan, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $32,500.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, F. H. Dolan, and that the said plaintiff, F. H. Dolan, is now the owner and holder thereof.

FOR A THIRD COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Ben Baxter, agreed to pay to the said Bank the sum of $1,750.00 and that pursuant to the said agreement said plaintiff, Ben Baxter, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, Ben Baxter, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, Ben Baxter, to the said Bank of the said sum of $1,750.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank has become and is now indebted to the said plaintiff, Ben Baxter, in the said sum of $1,750.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, Ben Baxter, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $1,750.00 plus interest, together with legal proof of his

said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, Ben Baxter, and that the said plaintiff, Ben Baxter, is now the owner and holder thereof.

FOR A FOURTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, S. James Tuffree, agreed to pay to the said Bank the sum of $3,500.00 and that pursuant to the said agreement said plaintiff, S. James Tuffree, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, S. James Tuffree, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, S. James Tuffree, to the said Bank of the said sum of $3,500.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank has become and is now indebted to the said plaintiff, S. James Tuffree, in the said sum of $3,500.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, S. James Tuffree, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $3,500.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, S. James Tuffree, and that the said plaintiff, S. James Tuffree, is now the owner and holder thereof.

FOR A FIFTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Ed Kelly, agreed to pay to the said Bank the sum of $9,000.00 and that pursuant to the said aggreement said plaintiff, Ed Kelly, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, Ed Kelly, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, Ed Kelly, to the said Bank of the said sum of $9,000.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank has become and

is now indebted to the said plaintiff, Ed Kelly, in the said sum of $9,000.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, Ed Kelly, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $9,000.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, Ed Kelly, and that the said plaintiff, Ed Kelly, is now the owner and holder thereof.

FOR A SIXTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, F. A. Yungbluth, agreed to pay to the said Bank the sum of $1,750.00 and that pursuant to the said agreement said plaintiff, F. A. Yungbluth, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, F. A. Yungbluth, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, F. A. Yungbluth, to the

said Bank of the said sum of $1,750.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, F. A. Yungbluth, in the said sum of $1,750.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, F. A. Yungbluth, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $1,750.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, F. A. Yungbluth, and that the said plaintiff, F. A. Yungbluth, is now the owner and holder thereof.

FOR A SEVENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, agreed to pay to the said Bank the sum of $3,850.00 and that pursuant to the said agreement said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, on or about July 17, 1931,

paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, to the said Bank of the said sum of $3,850.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, in the said sum of $3,850.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, her claim for the said sum of $3,850.00, plus interest, together with legal proof of her said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, and that the said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, is now the owner and holder thereof.

FOR AN EIGHTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, M. Del Giorgio, agreed to pay to the said Bank the sum of $875.00 and that pursuant to the said agreement said plaintiff, M. Del Giorgio, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, M. Del Giorgio, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, M. Del Giorgio, to the said Bank of the said sum of $875.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, M. Del Giorgio, in the said sum of $875.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, M. Del Giorgio, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $875.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no

part of the said claim has been paid to the said plaintiff, M. Del Giorgio, and that the said plaintiff, M. Del Giorgio, is now the owner and holder thereof.

FOR A NINTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Jennie Pomeroy, agreed to pay to the said Bank the sum of $3,500.00 and that pursuant to the said agreement said plaintiff, Jennie Pomeroy, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, Jennie Pomeroy, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, Jennie Pomeroy, to the said bank of the said sum of $3,500.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, Jennie Pomeroy, in the said sum of $3,500.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, Jennie Pomeroy, duly presented to the said J. V. Hogan, as

Receiver, as aforesaid, his claim for the said sum of $3,500.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, Jennie Pomeroy, and that the said plaintiff, Jennie Pomeroy, is now the owner and holder thereof.

FOR A TENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, J. W. Truxaw, agreed to pay to the said Bank the sum of $1,750.00 and that pursuant to the said agreement said plaintiff, J. W. Truxaw, on or about July 17, 1931, paid the said sum to the said bank; that no part of the said sum has been repaid to the said plaintiff, J. W. Truxaw, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, J. W. Truxaw, to the said Bank of the said sum of $1,750.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, J. W. Truxaw, in the said sum of $1,750.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, J. W. Truxaw, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $1,750.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, J. W. Truxaw, and that the said plaintiff, J. W. Truxaw, is now the owner and holder thereof.

FOR AN ELEVENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, J. J. Dwyer, agreed to pay to the said Bank the sum of $1,750.00 and that pursuant to the said agreement said plaintiff, J. J. Dwyer, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said plaintiff, J. J. Dwyer, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, J. J. Dwyer, to the said Bank of the said sum of $1,750.00 wholly failed, and that by reason of the matters and things herein set forth

said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, J. J. Dwyer, in the said sum of $1,750.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934, said plaintiff, J. J. Dwyer, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, his claim for the said sum of $1,750.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, J. J. Dwyer, and that the said plaintiff, J. J. Dwyer, is now the owner and holder thereof.

FOR A TWELFTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said F. K. Day agreed to pay to the said Bank the sum of $875.00 and that pursuant to the said agreement the said F. K. Day, on or about July 17, 1931, paid the said sum to the said Bank; that no part of the said sum has been repaid to the said F. K. Day, or to the plaintiff, M. E. Day, by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, includ-

ing the said bond account, the consideration for the said payment by the said F. K. Day, to the said Bank of the said sum of $875.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, M. E. Day, in the said sum of $875.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That on or about August 23, 1934 said plaintiff, M. E. Day, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, her claim for the said sum of $875.00, plus interest, together with legal proof of her said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, M. E. Day, and that the said plaintiff, M. E. Day, is now the owner and holder thereof.

FOR A THIRTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Ernest F. Ganahl, agreed to pay to the said Bank the sum of $1,750.00 and that pursuant to the said agreement the said Ernest F. Ganahl, on or about July 7, 1931, executed his promissory note to the said Bank in the said sum of $1,750.00; that subsequent to the execution of the said promissory note

by the said Ernest F. Ganahl the said Ernest F. Ganahl paid on the principal sum of the said note the sum of $550.89 and paid interest on the said promissory note in the sum of $150.31; that the said promissory note was duly delivered to the said Bank, and that the said Bank is now the owner and holder of said note and money so delivered and executed and no part of which has been repaid by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiff, Ernest F. Ganahl, to the said Bank of the said sum of $1,750.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiff, Ernest F. Ganahl, in the said sum of $1,750.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That thereafter and within the time limited by law the said plaintiff, Ernest F. Ganahl, duly presented to the said J. V. Hogan, as receiver, as aforesaid, his claim for the said sum of $1,750.00, plus interest, together with legal proof of his said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the said claim has been paid to the said plaintiff, Ernest F. Ganahl, and that the said plaintiff, Ernest F. Ganahl, is now the owner and holder thereof.

FOR A FOURTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, IV, VI and VIII of their first count as part of this count to the same extent as if herein set forth in full.

II

That in said agreement said plaintiff, Frank Baum, agreed to pay to the said Bank the sum of $5,250.00 and that pursuant to the said agreement the said plaintiff, Frank Baum, executed his promissory note to the said Bank, dated December 19, 1932, in the sum of $5,250.00; that subsequent to the execution of the said promissory note the said plaintiff, Frank Baum, paid the sum of $352.74 interest on the said promissory note; that subsequent to the execution of the said promissory note by the said Frank Baum the said Bank demanded from said Frank Baum security for said promissory note and the said Frank Baum and the plaintiff, Josephine Baum, his wife, on or about May 9, 1933, executed and delivered to said Bank a certain trust deed which said trust deed was duly recorded on May 22, 1933 at page 8, volume 618, Official Records, Orange County, California, on the following described real property:

All that property located in the City of Anaheim, County of Orange, described as follows, to-wit:

PARCEL 1: Lot Twenty-seven (27) in Block "A" of Tract No. 247, Monte Vista Tract," as per map thereof recorded in Book 13, page 51 of Miscellaneous Maps, Records of said Orange County.

PARCEL 2: Lot Twelve (12) in Block "C" of Davis Bros. Addition to Anaheim, as per map thereof recorded

in Book 2, pages 632 and 633 of Miscellaneous Records of Los Angeles County, California

Excepting therefrom the Westerly 10 feet thereof for widening Palm Street.

PARCEL 3: That portion of Vineyard Lot "E-6", as per map thereof recorded in Book 4, pages 629 and 630 of Deeds, Records of Los Angeles County, California, described as follows: Beginning at a point in the Southerly line of said Lot "E-6" which is 255 feet Easterly from the Southwest corner thereof, said point being also the Southeasterly corner of that certain parcel of land conveyed by Frank Baum et ux to H. H. Armbrust et ux by deed dated November 4th, 1931, and recorded January 14th, 1932, in Book 528, page 320 of Official Records of Orange County, California; thence Northerly on a line parallel with the Westerly line of said Lot "E-6" and also along the Easterly line of the land so conveyed to Armbrust to the Southerly line of a strip of land conveyed to the City of Anaheim for alley purposes by deed recorded May 23rd, 1924, in Book 524, page 297 of Deeds, Records of said Orange County; thence Easterly along the Southerly line of said alley a distance of 57.42 feet to an intersection with a line drawn parallel with and 311 feet Easterly from the Westerly line of said Lot "E-6"; thence Southerly along a line parallel with and distant 311 feet Easterly from the Westerly line of said Lot "E-6" a distance of 199.96 feet, more or less, to the Southerly corner of said Lot "E-6"; thence Westerly along the Southerly line of said Lot "E-6" 56 feet to the point of beginning.

Excepting therefrom that portion thereof on the South included within the lines of Broadway.

Reserving therefrom a right of way for a ditch or pipe line through said Tract for carrying water for irrigation purposes.

Above Parcels 1, 2 and 3 are subject to restrictions, reservations and conditions of record, also to second half of 1932-33 City, County and State taxes, also to 1933-34 City, County and State Taxes.

That said note and trust deed, aforesaid, were duly delivered to said Bank, and that said Bank is now the owner and holder of said note, trust deed and money so delivered and executed and no part of which has been repaid by the said Bank.

III

That by reason of the appointment of said Receiver and the liquidation of the assets of the said Bank, including the said bond account, the consideration for the said payment by the said plaintiffs, Frank Baum and Josephine Baum, to the said Bank of the said sum of $5,250.00 wholly failed, and that by reason of the matters and things herein set forth said defendant, Anaheim First National Bank, has become and is now indebted to the said plaintiffs, Frank Baum and Josephine Baum, in the said sum of $5,250.00, plus interest thereon at the rate of 7% per annum from January 15, 1934.

IV

That thereafter and within the time limited by law the said plaintiffs, Frank Baum and Josephine Baum, duly presented to the said J. V. Hogan, as Receiver, as aforesaid, their claim for the said sum of $5,250.00, plus interest, together with legal proof of their said claim, all in the manner and form as required by the said Comptroller of the Currency, as aforesaid; that no part of the

said claim has been paid to the said plaintiffs, Frank Baum and Josephine Baum, and that the said plaintiffs, Frank Baum and Josephine Baum, are now the owners and holders thereof.

FOR A FIFTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII and IX of their first count as part of this count to the same extent as if herein set forth in full.

II

That within two years last past the plaintiff, L. J. Kelly, loaned to the defendant, Anaheim First National Bank, the sum of $4,900.00, and said Bank thereupon received the said sum for the use and benefit of said plaintiff, L. J. Kelly, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, L. J. Kelly, although said plaintiff, L. J. Kelly, has on numerous occasions made demand on said Bank for payment thereof.

FOR A SIXTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII of their first count and Paragraph IV of their second count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, F. H. Dolan, loaned to the defendant, Anaheim First National Bank, the sum of $32,500.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, F. H. Dolan, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, F. H. Dolan, although said plaintiff, F. H. Dolan, has on numerous occasions made demand on said Bank for payment thereof.

FOR A SEVENTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII of their first count and Paragraph IV of their third count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, Ben Baxter, loaned to the defendant, Anaheim First National Bank, the sum of $1,750.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, Ben Baxter, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, Ben Baxter, although said plaintiff, Ben Baxter, has on numerous occasions made demand on said Bank for payment thereof.

FOR AN EIGHTEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII of their first count and Paragraph IV of their fourth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, S. James Tuffree, loaned to the defendant, Anaheim First National Bank, the sum of $3,500.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, S. James Tuffree, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, S. James Tuffree, although said plaintiff, S. James Tuffree, has on numerous occasions made demand on said Bank for payment thereof.

FOR A NINETEENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their fifth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, Ed Kelly, loaned to the defendant, Anaheim First National Bank, the sum of $9,000.00, and said Bank thereupon received said sum for the use and benefit

of said plaintiff, Ed Kelly, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, Ed Kelly, although said plaintiff, Ed Kelly, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTIETH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII of their first count and Paragraph IV of their sixth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, F. A. Yungbluth, loaned to the defendant, Anaheim First National Bank, the sum of $1,750.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, F. A. Yungbluth, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, F. A. Yungbluth, although said plaintiff, F. A. Yungbluth, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-FIRST COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, VIII of their first count and Paragraph IV of their seventh count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, Minnie Palmer, formerly known as Minnie Baxter, loaned to the defendant, Anaheim First National Bank, the sum of $3,850.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, although said plaintiff, Minnie Palmer, formerly known as Minnie Baxter, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-SECOND COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III, and VIII of their first count and Paragraph IV of their eighth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, M. Del Giorgio, loaned to the defendant, Anaheim First National Bank, the sum of $875.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, M. Del Giorgio, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, M. Del Giorgio, although said plaintiff, M. Del Giorgio, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-THIRD COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their ninth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, Jennie Pomeroy, loaned to the defendant, Anaheim First National Bank, the sum of $3,500.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, Jennie Pomeroy, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, Jennie Pomeroy, although said plaintiff, Jennie Pomeroy, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-FOURTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their tenth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, J. W. Truxaw, loaned to the defendant, Anaheim First National Bank, the sum of $1,750.00, and said Bank thereupon received said sum for the use and

benefit of said plaintiff, J. W. Truxaw, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, J. W. Truxaw, although said plaintiff, J. W. Truxaw, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-FIFTH COUNT PLAINTIFFS ALLEGE:

I

Plaitniffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their eleventh count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the plaintiff, J. J. Dwyer, loaned to the defendant, Anaheim First National Bank, the sum of $1,750.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, J. J. Dwyer, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, J. J. Dwyer, although said plaintiff, J. J. Dwyer, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-SIXTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their twelfth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count, the said F. K. Day loaned to the defendant, Anaheim First National Bank, the sum of $875.00, and said Bank thereupon received said sum for the use and benefit of said F. K. Day, and promised to repay the same on demand, but no part of said sum has been repaid to said F. K. Day or to the plaintiff, M. E. Day, although said plaintiff, M. E. Day, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-SEVENTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their thirteenth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count the plaintiff, Ernest F. Ganahl, loaned to the defendant, Anaheim First National Bank, the sum of $1,750.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, Ernest F. Ganahl, and promised to repay the same on demand but no part of said sum has been repaid to said plaintiff, Ernest F. Ganahl, although said plaintiff, Ernest F. Ganahl, has on numerous occasions made demand on said Bank for payment thereof.

FOR A TWENTY-EIGHTH COUNT PLAINTIFFS ALLEGE:

I

Plaintiffs hereby incorporate Paragraphs I, II, III and VIII of their first count and Paragraph IV of their fourteenth count to the same extent as if herein set forth in full.

II

That within two years last past and as a part of the transaction set forth in plaintiffs' fifteenth count the plaintiff, Frank Baum, loaned to the defendant, Anaheim First National Bank, the sum of $5,250.00, and said Bank thereupon received said sum for the use and benefit of said plaintiff, Frank Baum, and promised to repay the same on demand, but no part of said sum has been repaid to said plaintiff, Frank Baum, although said plaintiff, Frank Baum, has on numerous occasions made demand on said Bank for payment thereof.

WHEREFORE, plaintiffs, and each of them, pray judgment against the said defendant, Anaheim First National Bank, a national banking association, as follows:

1. (a) For plaintiff, L. J. Kelly, the sum of $4,900.00.
   (b) For plaintiff, F. H. Dolan, the sum of $32,500.00.
   (c) For plaintiff, Ben Baxter, the sum of $1,750.00.
   (d) For plaintiff, S. James Tuffree, the sum of $3,500.00.
   (e) For plaintiff, Ed Kelly, the sum of $9,000.00.
   (f) For plaintiff, F. A. Yungbluth, the sum of $1,750.00.
   (g) For plaintiff, Minnie Palmer, formerly known as Minnie Baxter, the sum of $3,850.00.

(h) For plaintiff, M. Del Giorgio, the sum of $875.00.

(i) For Plaintiff, Jennie Pomeroy, the sum of $3,500.00.

(j) For plaintiff, J. W. Truxaw, the sum of $1,750.00.

(k) For plaintiff, J. J. Dwyer, the sum of $1,750.00.

(l) For plaintiff, M. E. Day, the sum of $875.00.

(m) For plaintiff, Ernest F. Ganahl, the sum of $1,750.00.

(n) For plaintiffs, Frank Baum and Josephine Baum, the sum of $5,250.00.

2. For interest on each and all of the aforesaid amounts at the rate of 7% per annum from January 15, 1934.

3. That the defendant, Anaheim First National Bank, redeliver and cancel all notes and trust deed received from plaintiffs heretofore alleged to have been given to said defendant Bank and that the lien created by any such instruments on any of the property heretofore enumerated be cancelled and that said defendant Bank cause to be recorded a satisfaction of any liens heretofore given by plaintiffs upon the matters herein litigated.

4. For plaintiffs' costs of suit and for such other and further relief as to the Court may seem meet and proper.

SPARLING & TEEL
WM. J. M. HEINZ and
BENNO M. BRINK
By Wm J M Heinz,
Attorneys for plaintiffs

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

L. J. KELLY being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled matter; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

L. J. KELLY

Subscribed and sworn to before me this 10th day of January, 1936.

WM. J. M. HEINZ
Notary Public in and for the County of Orange, State of California

(Seal)

[Endorsed]: Filed Jan 11 1936 J. M. Backs, County Clerk By H Deputy. Filed March 16, 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy.

[TITLE OF SUPERIOR COURT AND CAUSE.]

NO. 33866

PETITION FOR REMOVAL OF CAUSE TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Comes now the defendant, Anaheim First National Bank, a national banking association by and thru J. V. Hogan, Receiver of the said Anaheim First National Bank, a national banking association, and acting for and on behalf of the Anaheim First National Bank, a national banking association, by this its petition herein shows the court and alleges:

I

That defendant herein appears specially for removing this suit to the United States District Court, Southern District of California, Central Division, and for no other purpose.

II

That at all times hereinafter mentioned, and that at all times mentioned and described in the complaint herein the defendant, Anaheim First National Bank, of Anaheim, California, was and now is a national banking association, duly organized and existing under the laws of the United States of America, with its principal place of business in the City of Anaheim, County of Orange, State of California, and is for the purpose of this petition a citizen and resident of the Central Division of the Southern District of California. That on the 15th day of January, 1934, the said bank having become insolvent, its property and affairs were taken into the custody, control and posses-

sion by the Comptroller of the Currency of the United States pursuant to the laws of the United States, and J. V. Hogan was on the said 15th day of January, 1934, duly appointed and commissioned by the said Comptroller of the Currency of the United States as the Receiver of the said Anaheim First National Bank of Anaheim, California, and said J. V. Hogan, did qualify as such, and ever since has been and now is the duly qualified and acting receiver of the said Anaheim First National Bank, of Anaheim, California. That the affairs of the said Anaheim First National Bank of Anaheim, California, *is* being wound up by J. V. Hogan as receiver of the said Anaheim First National Bank of Anaheim, California, under and pursuant to the laws of the United States, and more particularly that portion of the laws of the United States commonly known as the National Banking Act of the United States and Acts of Congress amendatory thereof.

III

That the action herein is a civil action, arising under the Constitution and the Laws of the United States; the same involving the sum of $73,000.00 with interest thereon at the rate of seven per cent per annum from January 15th, 1934, and as appears from the complaint herein the purpose of said action is to compel the petitioner and J. V. Hogan, as its receiver, to allow the alleged claims of the plaintiffs set forth in this complaint as a legal claim and to obtain its payment or such sums as has already been paid as dividends. That the nature of said action is such that it concerns and interferes with the winding up of the affairs of the said Anaheim First National Bank, of Anaheim California, and affects the

assets and funds in the hands of the petitioner and J V. Hogan, as receiver of the said bank, and that the proper construction of the laws of the United States is involved in said action. That Judicial Code, Section 24, Sub. 16 (U. S. C. A. Title 28, Sect. 41 Sub. 16) provides that the Federal Court has original jurisdiction for cases for the winding up of the affairs of a national banking association, and Judicial Code, Section 28 and 29 (U. S. C. A. Title 28, Sect. 71-72) provide for the removal of such cases to the Federal Court where originally brought in a State court.

IV

That your petitioner desires to remove this suit before the trial thereof and before the time to plead to the District Court of the United States, Southern District of California, Central Division: that the summons and complaint herein were served upon your petitioner on or about January 11th, 1936, and the time for answering or pleading to the complaint will not expire as to petitioner until the 15th day of February, 1936, and this petition therefore is made and filed before the time that these defendants are required by the law of the State of California to answer or plead to said complaint.

V

That petitioner hereby offers and files herein a bond duly made and executed with good and sufficient security for entering into the District Court of the United States, Southern District of California, Central Division, within

thirty days from the filing of this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by the said District Court of the United States, Southern District of California, Central Division, if said Court shall hold that said suit was wrongfully and improperly removed thereto.

VI

That notice of this petition and the copy thereof and a copy of said bond have been served upon counsel for plaintiffs herein.

WHEREFORE, Your petitioner prays this Court to proceed no further herein except to answer this petition and accept said bond presented herewith, make the proper order for the removal and cause the record of said court to be removed into the said District Court of the United States, Southern District of California, Central Division.

ANAHEIM FIRST NATIONAL BANK,
a National Banking Association,
By J. V. HOGAN
Petitioner

DOCKWEILER and DOCKWEILER AND
BENJAMIN CHIPKIN
By HENRY DOCKWEILER
Henry Dockweiler
Benjamin Chipkin

Dated this 14th day of February, 1936.

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

J. V. HOGAN, being by me first duly sworn, deposes and says: That he is Receiver of the Anaheim First National Bank, a national banking association, defendant herein in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; and makes this verification on behalf of said association and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

J. V. HOGAN

Subscribed and sworn to before me this 14th day of February, 1936.

BENJAMIN CHIPKIN
Notary Public in and for the County of
Los Angeles, State of California

(Seal)

[Endorsed]: Filed Feb. 15 1936, J. M. Backs, County Clerk, By H Deputy. Filed March 16, 1936. R. S. Zimmerman, Clerk, By Robert P. Simpson Deputy.

[TITLE OF SUPERIOR COURT AND CAUSE.]

No. 33866

NOTICE OF PETITION FOR REMOVAL CASE TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

TO SPARLING & TEEL, WM. J. M. HEINZ AND BENNO M. BRINK, Attorneys for plaintiffs herein:

PLEASE TAKE NOTICE that the Anaheim First National Bank, a national banking association, appearing specially for that purpose and none other, will on the 21st day of February, 1936, in Depart. 3 of the above entitled court, at the hour of 2 P. M., or as soon thereafter as counsel can be heard, move the Court to accept the petition of said defendant and his bond executed by a surety company authorized to transact business in this State, for the removal of said cause to the District Court of the United States, in and for the Southern District of California, Central Division, and to proceed no further in said suit. A copy of said petition and bond is hereto attached by reference incorporated herein and made a part of this notice. Said motion will be made upon all the papers and files in said action.

Dated this 14th day of February, 1936.

ANAHEIM FIRST NATIONAL BANK,
a national banking association;
HENRY DOCKWEILER
DOCKWEILER & DOCKWEILER &
BENJAMIN CHIPKIN
Benjamin Chipkin
Attorneys for defendant.

[Endorsed]: Filed Feb. 15, 1936. J. M. Backs, County Clerk, By H Deputy. Filed March 16, 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy.

[TITLE OF SUPERIOR COURT AND CAUSE.]

No. 33866

BOND ON REMOVAL

KNOW ALL MEN BY THESE PRESENTS:

THAT THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, duly organized and existing under the laws of the State of New York, and having authority to transact business within the State of California, is held and firmly bound unto L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUPH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO. JENNIE POMEROY, J. W. TRUXAN, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, hsuband and wife in the sum of ONE THOUSAND AND NO/100 DOLLARS ($1,000.00) for the payment of which, well and truly to be made to the said L. J. Kelly, F. H. Dolan, Ben Baxter, S. James Tuffree, Ed Kelly, F. A. Yungbluph, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy, J. W. Truxan, J. J. Dwyer, M. E. Day, Ernest F. Ganahl, Frank Baum and Josephine Baum, husband and wife, their heirs, executors, administrators and assigns, the said THE FIDELITY AND CASUALTY COMPANY OF NEW YORK binds itself, its successors and assigns, jointly and firmly by these presents, upon condition, nevertheless, that,

WHEREAS, the above named plaintiffs have heretofore brought suit of a civil nature in the Superior Court of the State of California in and for the County of Orange, against the said Anaheim First National Bank, a national banking association, and

WHEREAS, said Anaheim First National Bank, a national banking association, by and through J. V. Hogan, as receiver and acting on behalf of the Anaheim First National Bank, a national banking association, simultaneously with the filing of this bond intends to file its petition in said suit in said state court for the removal of said suit into the District Court of the United States in and for the Southern District of California, Central Division, according to the provisions of the Act of Congress, in such case made and provided:

NOW THEREFORE, the condition of this obligation, is such that, if the said petitioner, Anaheim First National Bank, a national banking association, by and through J. V. Hogan. as receiver and acting on behalf of the Anaheim First National Bank, a national banking association, shall enter in the District Court of the United States for the Southern District of California, Central Division, within thirty days from the date of filing said petition, a certified copy of the record of such suit, and shall well and truly pay all costs that may be awarded by the said District Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requested thereon, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

IN WITNESS WHEREOF, the said THE FIDELITY AND CASUALTY COMPANY OF NEW YORK has caused these presents to be signed by its duly authorized attorney and its corporate seal to be hereunto affixed at

Los Angeles, California, this 14th day of February, in the year nineteen hundred and thirty-six.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK
BY WILLIAM J. BENNETT
ATTORNEY (SEAL)

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

On this 14th day of February in the year One Thousand Nine Hundred Thirty-Six, before me Paul J. Emme, a notary public in and for said County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared William J. Bennett, known to me to be the ATTORNEY of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, the corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of Los Angeles, the day and year in this certificate first above written.

PAUL J. EMME
Notary Public in and for the County of
Los Angeles, State of California

(SEAL)

My commission expires 5-22-39.

[Endorsed]: Filed Feb 15 1936. J. M. Backs, County Clerk, By H Deputy Filed March 16, 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy.

[TITLE OF SUPERIOR COURT AND CAUSE.]

No. 33866

ORDER FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

This cause coming on for hearing upon petition and bond of the defendant, Anaheim First National Bank, a national banking association, for an order transferring this cause to the District Court of the United States, Southern District of California, Central Division, and it appearing to the court that the defendant has filed its petition for such removal in due form of law, and within the time provided by law, and has filed its bond duly conditioned, with good and sufficient surety, as provided by law, and that defendant has given plaintiffs due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States, Southern District of California, Central Division:

NOW THEREFORE, on motion of Benjamin Chipkin and Dockweiler and Dockweiler, attorneys for defendant Anaheim First National Bank, a national banking association, said petition and bond are hereby accepted, and it is hereby ordered and adjudged that this cause be, and it hereby is, removed to the District Court of the United States, Southern District of California, Central Division, and the clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

DATED: this 5th day of March, 1936.

G. K. SCOVEL
JUDGE

[Endorsed]: Filed Mar 5 1936 J. M. Backs, County Clerk, By H Deputy. Filed March 16, 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, et al.,	)	
Plaintiffs,	)	No. 7522-J
vs.	)	NOTICE OF
ANAHEIM FIRST NATIONAL BANK, etc., et al.,	)	MOTION TO REMAND
Defendants.	)	

TO ANAHEIM FIRST NATIONAL BANK, a national banking association, and to MESSRS. DOCKWEILER AND DOCKWEILER and BENJAMIN CHIPKIN, its attorneys:

YOU AND EACH OF YOU will take notice that on May 11th, 1936, at 10 o'clock A.M., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable William P. James, Judge of the above-entitled court at Los Angeles, I shall apply for an order remanding the above entitled cause to the Superior Court of the County of Orange, State of California, from whence it was removed.

This motion will be made upon the papers and documents in the above numbered file, the motion and memorandum of points and authorities, copies of which are attached hereto, and by this reference made a part hereof and served herewith.

Dated: April 30, 1936.

SPARLING & TEEL,
WM. J. M. HEINZ and
JOSEPH SCOTT
By Joseph Scott
JOSEPH SCOTT
Attorneys for Plaintiffs

[Endorsed]: Filed Apr. 30, 1936. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J

MOTION TO REMAND

TO DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Now come the plaintiffs and each of them, and move this court to remand the above entitled cause to the Superior Court of the State of California, in and for the County of Orange, on the ground that this court is without jurisdiction to hear and determine the cause and that said cause was improperly removed to this court from said Superior Court, in that (1) the action here involved is upon a completed contract and is not a case winding up the affairs of a national bank, (2) the action is to establish a claim against the defendant national bank and is brought against said bank and the receiver of said bank is not a party to this action, and (3) the receiver is a proper but not a necessary party to this action.

Dated: April 30, 1936.

SPARLING & TEEL,
WM. J. M. HEINZ and
JOSEPH SCOTT
By Joseph Scott
Joseph Scott
Attorneys for plaintiffs

[Endorsed]: Filed Apr. 30, 1936. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

At a Stated Term, to-wit: the February Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the 12th day of May, in the year of our Lord one thousand nine hundred and thirty-six.

PRESENT: The Honorable: Wm. P. James, District Judge.

L. J. KELLY, et al,	)	
Plaintiffs,	)	
vs.	)	No. 7522-J
ANAHEIM FIRST NATIONAL BANK, et al.,	)	LAW
Defendants.	)	

J. V. HOGAN, Receiver, Intervener.

This action having been brought by plaintiffs in the Superior Court of the County of Orange, State of California, the receiver in charge of the assets of said bank, for the purpose of liquidation, filed his intervening petition in said Superior Court, together with his petition for removal of the cause to this Court, which removal was ordered. And on the 11th day of May, 1936, the plaintiffs presented their motion to remand the cause on the ground that no right of removal existed in the receiver of the defendant national bank; and the matter having been argued by respective counsel and submitted to the Court for decision; the Court now concludes that the issues presented are directly concerned with the winding up of the affairs of said national bank and that the receiver as an officer of the United States has the right to a trial of said issues in the United States District Court. It is therefore ordered that the motion to remand be, and it is denied, and an exception is noted in favor of the plaintiffs.

[Title of District Court and Cause.]

No. 7522-J

NOTICE

TO PLAINTIFFS IN THE ABOVE ENTITLED ACTION AND TO JOSEPH SCOTT, THEIR ATTORNEY:

YOU AND EACH OF YOU PLEASE TAKE NOTICE that the motion to remand heretofore filed by you, and heard on May 11th, 1936, before the Honorable Judge James, has been denied.

BENJAMIN CHIPKIN AND
DOCKWEILER AND DOCKWEILER
By Benjamin Chipkin
Attorneys for defendant

Dated this 16th day of May, 1936.

[Endorsed]: Filed May 25 1936. R. S. Zimmerman, Clerk. By Robert P. Simpson, Deputy Clerk.

[Title of District Court and Cause.]

No. 7522-J

ANSWER

Comes now the defendant Anaheim First National Bank, a national banking association, by and thru J. V. Hogan, Receiver of said Anaheim First National Bank, a national banking association and for answer to the complaint on file herein admits, denies and alleges:

I

Answering paragraph I of said complaint, admits F. K. Day is now dead, but denies each and every allegation not admitted herein generally and specifically.

II

Admits paragraph III of said complaint.

III

Answering paragraph IV of said complaint this answering defendant admits that a depreciation existed in the Bond Account of said defendant Anaheim First National Bank on or about June 18th 1931; denies that on or about June 18th 1931 or at any other time or at all did the plaintiffs herein together with other shareholders of said bank enter into an agreement with the said bank, whereby the shareholders of the bank and the said F. K. Day and all of the said plaintiffs herein and each of them agreed to purchase from the said bank the depreciation then existing in the said Bond Account; deny that by the terms of said agreement or any agree-

ment did the Bank agree to pay from time to time to the aforementioned parties any prorata decrease which might from time to time appear in the said depreciation of the said Bond Account of the said bank.

IV

Answering paragraph V of said complaint, this answering defendant denies each and every allegation of said paragraph generally and specifically.

V

Answering paragraph VI of said complaint, this answering defendant admits each and every allegation of said paragraph.

VI

Answering paragraph VII of said complaint, this answering defendant denies each and every allegation of said paragraph generally and specifically.

VII

Answering paragraph VIII of said complaint, this answering defendant admits each and every allegation of paragraph VIII of said complaint.

VIII

Answering paragraph IX of said complaint, this answering defendant admits that L. J. Kelly presented a claim to the Receiver for the sum of $4900.00 and interest; admits that said claim was not paid, but in this connection, this answering defendant alleges that said claim is not a valid or subsisting claim against the bank in any manner whatsoever or at all.

ANSWERING THE SECOND CAUSE OF ACTION this answering defendant admits, denies and alleges:

I

Answering paragraph I of said second cause of action this answering defendant adopts its answer to paragraph I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its second cause of action the same as if each paragraph has been set out herein in full.

II

Answering paragraph II of the said second cause of action, this answering defendant denies that F. H. Dolan agreed to pay the bank the sum of $32,500.00 or any sum whatsoever or at all, pursuant to the alleged agreement of June 18th, 1931; admits that no part of $32,-500.00 has been repaid to defendant F. H. Dolan, but in this connection said defendant alleges that no sum whatsoever is due to plaintiff herein.

III

Answering paragraph III of said second cause of action, this answering defendant denies each and every allegation of said second count generally and specifically.

IV

Answering paragraph IV of the second cause of action, this answering defendant admits that said F. H. Dolan presented a claim to the Receiver for the sum of $32,500.00, plus interest; admits that said claim was not paid, but in this connection this answering defendant alleges that the said claim is not a valid or subsisting claim against the bank in any manner, whatsoever or at all.

ANSWERING THE THIRD CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' third cause of action, this answering defendant adopts its answer to *paragraph* I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the third cause of action the same as if set out herein in full.

II

Answering paragraph II of the third cause of action, this answering defendant denies that Ben Baxter agreed to pay the sum of $1750.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $1750.00 has been repaid to plaintiff Ben Baxter, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the Third Cause of Action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of the said third cause of action, this answering defendant admits that plaintiff Ben Baxter presented to the said J. V. Hogan as Receiver a claim for $1750.00, plus interest; admits that no part of said claim has been paid to plaintiff Ben Baxter, but in that connection defendant alleges that the said bank is not indebted to plaintiff Ben Baxter in any sum whatsoever, or at all and that the alleged claim presented by the said Ben Baxter is not a valid or subsisting claim in any manner whatsoever or at all.

ANSWERING THE FOURTH CAUSE OF ACTION defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' fourth cause of action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the fourth cause of action the same as if set out herein in full.

II

Answering paragraph II of plaintiffs' fourth cause of action, this answering defendant denies that S. James Tuffree agreed to pay to the said bank the sum of $3500.00 and that pursuant to the alleged agreement of June 18th 1931, the said S. James Tuffree on or about July 17th 1931 did pay the said sum of $3500.00 to the said bank; admits that no part of the said sum of $3500.00 has been repaid to plaintiff S. James Tuffree, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the fourth cause of action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of said fourth cause of action, this answering defendant admits that plaintiff S. James Tuffree presented a claim to the Receiver of defendant bank for the sum of $3500.00 plus interest; admits that said claim was not paid, but in this connection this answering defendant alleges that the said claim is not a valid or subsisting claim against the bank in any manner whatsoever.

ANSWERING PLAINTIFFS' FIFTH CAUSE OF ACTION, this answering defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' fifth cause of action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the fifth cause of action, the same as if set out herein in full.

II

Answering paragraph II of plaintiffs' fifth cause of action, this answering defendant denies that Ed Kelly agreed to pay the sum of $9,000.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of said sum has been repaid to said plaintiff Ed Kelly, but in this connection said defendant alleges that no sum whatsoever or at all is due plaintiff Ed Kelly from defendant herein.

III

Answering paragraph III of the Fifth Cause of action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of the Fifth Cause of Action, this answering defendant admits that Ed Kelly presented to J. V. Hogan, as Receiver of said bank a claim for $9,000.00 and interest; admits that no part of said claim has been paid to plaintiff Ed Kelly, but in this connection defendant alleges that the said bank is not indebted to plaintiff Ed Kelly in any sum whatsoever or at all

and that the alleged claim presented by Ed Kelly is not a valid or subsisting claim against the bank in any manner whatsoever or at all.

ANSWERING THE SIXTH CAUSE OF ACTION, defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' sixth cause of action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the sixth cause of action, the same as if set out herein in full.

II

Answering paragraph II of the sixth cause of action, this answering defendant denies that F. A. Yungbluth agreed to pay to the bank the sum of $1750.00 or any other sum whatsoever, or at all, pursuant to the alleged agreement of June 18th, 1931; admits that no part of the sum of $1750.00 has been repaid, to the plaintiff F. A. Yungbluth, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the sixth cause of action, this answering defendant denies each and every allegation generally and specifically.

IV

Answering paragraph IV of the sixth cause of action, this answering defendant admits that plaintiff F. A. Yungbluth duly presented to the said J. V. Hogan, as Receiver of said bank a claim for the sum of $1750.00 plus inter-

est; admits that no part of said claim has been paid to plaintiff F. A. Yungbluth, but in this connection, defendant alleges that the said bank is not indebted to plaintiff F. A. Yungbluth in any sum whatsoever or at all; that the alleged claim presented by F. A. Yungbluth is not a valid or subsisting claim against the bank in any manner whatsoever or at all.

ANSWERING PLAINTIFFS' SEVENTH CAUSE OF ACTION, this answering defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' Seventh Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of its answer to the Seventh Cause of Action, the same as if set out herein in full.

II

Answering paragraph II of the Seventh Cause of Action, this answering defendant denies that Minnie Palmer, formerly known as Minnie Baxter, agreed to pay the sum of $3850.00 or any other sum whatsoever, or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $3850.00 has been repaid to the said plaintiff Minnie Palmer, formerly known as Minnie Baxter, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

Answering paragraph III of the Seventh Cause of Action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of the said Seventh Cause of Action, this answering defendant admits that plaintiff Minnie Palmer, formerly known as Minnie Baxter, presented to the Receiver a claim for the sum of $3850.00 plus interest; admits that no part of said claim has been paid to plaintiff Minnie Palmer, formerly known as Minnie Baxter, but in this connection defendant alleges that the said bank is not indebted to plaintiff Minnie Palmer, formerly known as Minnie Baxter, in any sum whatsoever or at all, and that the alleged claim presented by the said Minnie Palmer, formerly known as Minnie Baxter, is not a valid or subsisting claim in any manner whatsoever or at all.

ANSWERING THE EIGHTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' Eighth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the eighth cause of action, the same as if set out herein in full.

II

Answering paragraph II of plaintiffs' Eighth Cause of Action, this answering defendant denies that plaintiff M. Del Giorgio agreed to pay to the bank the sum of $875.00, or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th, 1931;

admits that no part of the sum of $875.00 has been repaid to plaintiff M. Del Giorgio, but in that connection, said defendant alleges that no sum whatsoever or at all is due the plaintiff herein.

III

Answering paragraph III of the eighth cause of action, this defendant denies each and every allegation generally and specifically:

IV

Answering paragraph IV of the said eighth cause of action, this answering defendant admits that plaintiff M. Del Giorgio presented to J. V. Hogan, as Receiver a claim for $875.00 and interest; admits that no part of said claim has been paid to plaintiff M. Del Giorgio, but in that connection defendant alleges that the said bank is not indebted to plaintiff M. Del Giorgio in any sum whatsoever, or at all and that the alleged claim presented by the said M. Del Giorgio is not a valid or subsisting claim in any manner whatsoever or at all.

ANSWERING THE NINTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' Ninth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of its answer to the Ninth Cause of Action, as if set out herein in full.

II

Answering paragraph II of the Ninth Cause of Action, this answering defendant denies that Jennie Pomeroy

agreed to pay the sum of $3500.00 or any other sum whatsoever or at all pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $3500.00 has been repaid to the plaintiff Jennie Pomeroy, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the Ninth Cause of Action, this answering defendant denies each and every allegation generally and specifically.

IV

Answering paragraph IV of the said Ninth Cause of Action, this answering defendant admits that plaintiff Jennie Pomeroy duly presented to the said J. V. Hogan, as Receiver, a claim for the sum of $3500.00, plus interest; admits that no part of said claim has been paid to plaintiff Jennie Pomeroy, but in that connection defendant alleges that the said bank is not indebted to plaintiff Jennie Pomeroy in any sum whatsoever or at all, and that the alleged claim presented by the said Jennie Pomeroy is not a valid or subsisting claim in any manner whatsoever or at all.

ANSWERING THE TENTH CAUSE OF ACTION, defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' Tenth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the Tenth Cause of Action the same as if set out herein in full.

II

Answering paragraph II of the Tenth Cause of Action, this answering defendant denies that J. W. Truxau agreed to pay the sum of $1750.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $1750.00 has been paid to plaintiff J. W. Truxaw, but in this connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the Tenth Cause of Action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of the said Tenth Cause of Action, this answering defendant admits that plaintiff J. W. Truxaw presented to J. V. Hogan, as Receiver of said bank a claim for the sum of $1750.00 plus interest; admits that no part of said claim has been paid to plaintiff J. W. Truxau, but in that connection defendant alleges that the said bank is not indebted to plaintiff J. W. Truxaw in any sum whatsoever or at all and that the alleged claim presented by the said J. W. Truxau is not a valid or subsisting claim in any manner whatsoever or at all.

Answering the Eleventh Cause of Action, this answering defendant admits, denies and alleges:

I

Answering paragraph I of the plaintiffs' Eleventh Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the

first cause of action and makes it part of this its answer to the Eleventh Cause of Action the same as if set out herein in full.

II

Answering paragraph II of the Eleventh Cause of Action, this answering defendant denies that J. J. Dwyer agreed to pay the bank the sum of $1750.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $1750.00 has been repaid to the plaintiff J. J. Dwyer, but in his connection said defendant alleges that no sum whatsoever or at all is due plaintiff herein.

III

Answering paragraph III of the Eleventh Cause of Action, this answering defendant denies each and every allegation generally and specifically.

IV

Answering paragraph IV of the Eleventh Cause of Action, this answering defendant admits that plaintiff J. J. Dwyer duly presented to the said J. V. Hogan as Receiver of said bank a claim for the sum of $1750.00 plus interest; admits that no part of said claim has been paid to plaintiff J. J. Dwyer, but in this connection defendant alleges that the said bank is not indebted to plaintiff J. J. Dwyer in any sum whatsoever or at all; that the alleged claim presented by J. J. Dwyer is not a valid or subsisting claim against the bank in any manner whatsoever or at all.

ANSWERING THE TWELFTH CAUSE OF ACTION, defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' Twelfth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first Cause of Action and makes it part of its answer to the Twelfth Cause of Action, the same as if set out herein in full.

II

Answering paragraph II of the Twelfth Cause of Action, this answering defendant denies that F. K. Day agreed to pay the sum of $875.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that no part of the sum of $875.00 has been repaid to F. K. Day or plaintiff M. E. Day by the said bank, but in that connection defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the Twelfth Cause of Action, this answering defendant denies each and every allegation of said paragraph generally and specifically.

IV

Answering paragraph IV of said Twelfth Cause of Action, this answering defendant denies each and every allegation generally and specifically.

ANSWERING THE THIRTEENTH CAUSE OF ACTION, defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' Thirteenth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the Thirteenth Cause of Action, the same as if set out herein in full.

II

Answering paragraph II of plaintiffs' Thirteenth Cause of Action, this answering defendant denies that Ernest F. Ganahl agreed to pay to the bank the sum of $1750.00 or any sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that the said Ernest F. Ganahl did on or about July 7th 1931 execute his promissory note in the sum of $1750.00; admits that said Ernest F. Ganahl has paid on account of principal the sum of $550.89 and interest in the sum of $150.31; admits that the said bank is the holder of the note and money paid thereon: admits that no part thereof has been repaid to the said Ernest F. Ganahl by the bank, but in that connection said defendant alleges that no sum whatsoever or at all is due to plaintiff herein.

III

Answering paragraph III of the Thirteenth Cause of Action, this answering defendant denies each and every allegation generally and specifically.

IV

Answering paragraph IV of the Thirteenth Cause of Action, this answering defendant admits that plaintiff Ernest F. Ganahl duly presented to J. V. Hogan, as Re-

ceiver of said bank his claim for the sum of $1750.00 plus interest; admits that no part of said claim has been paid to plaintiff Ernest F. Ganahl, but in this connection defendant alleges that the said bank is not indebted to Ernest F. Ganahl in any sum whatsoever or at all; that the alleged claim presented by the said Ernest F. Ganahl is not a valid or subsisting claim against the bank in any manner whatsosever or at all.

ANSWERING THE FOURTEENTH CAUSE OF ACTION defendant admits, denies and alleges:

I

Answering paragraph I of plaintiffs' Fourteenth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, IV, VI and VIII of the first cause of action and makes it part of this its answer to the Fourteenth Cause of action the same as if set out herein in full.

II

Answering paragraph II of the said Fourteenth Cause of Action, this answering defendant denies that plaintiff Frank Baum agreed to pay the bank the sum of $5250.00 or any other sum whatsoever or at all, pursuant to the alleged agreement of June 18th 1931; admits that Frank Baum executed a promissory note to the bank dated December 19th 1932, in the sum of $5250.00; admits that the said Frank Baum paid the sum of $352.74 on account of interest on said note; admits that on or about May 9th 1933, the plaintiffs Frank Baum and Josephine Baum executed and delivered to the said bank a trust deed on property described therein and to which description reference is made to said paragraph II of the said Fourteenth Cause of Action; admits that said trust deed

was recorded on May 22nd 1933 at page 8, Vol. 618, Official Records, Orange County, California; admits that no part of the money paid in by plaintiff Frank Baum has been repaid by the said bank, but in this connection defendant alleges that no sum whatsoever or at all is due to plaintiffs herein.

III

Answering paragraph III of said Fourteenth Cause of Action, this answering defendant denies each and every allegation generally and specifically.

IV

Answering paragraph IV of the Fourteenth Cause of Action, this answering defendant admits that plaintiffs Frank Baum and Josephine Baum have duly presented to the said J. V. Hogan, as Receiver of said bank a claim for the sum of $5250.00 plus interest; admits that no part of said claim has been paid to plaintiffs Frank Baum and Josephine Baum, but in this connection defendant alleges that the said bank is not indebted to plaintiffs Frank Baum and Josephine Baum in any sum whatsoever or at all; that the alleged claim presented by Frank Baum and Josephine Baum is not a valid or subsisting claim against the bank in any manner whatsoever or at all.

ANSWERING THE FIFTEENTH CAUSE OF ACTION, this answering defendant admits, denies and alleges:

I

Answering paragraph I of the Fifteenth Cause of Action, this answering defendant adopts its answer to paragraphs I, II, III, VIII and IX of the first cause of action and makes it part of his answer to paragraph

I of this count, the same as if said answer and each paragraph has been set out herein in full.

II

Answering paragraph II of said Ffteenth Cause of Action, this answering defendant denies each and every allegation generally and specifically.

ANSWERING THE SIXTEENTH CAUSE OF ACTION, this answering defendant admits, denies and alleges:

I

Answering paragraph I of the Sixteenth Cause of Action, this answering defendant adopts its answer to *paragraph* I, II, III, and VIII of the first cause of action and paragraph IV of the second cause of action and makes it part of this his answer to said paragraph I of the Sixteenth Cause of Action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the said Sixteenth Cause of Action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE SEVENTEENTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Seventeenth Cause of Action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the third cause of action and makes it part of this his answer to said paragraph I of the Seventeenth Cause of Action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Seventeenth Cause of Action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE EIGHTEENTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Eighteenth Cause of Action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the fourth cause of action and makes it part of this his answer to said paragraph I of the Eighteenth Cause of Action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Eighteenth Cause of Action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE NINETEENTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Nineteenth Cause of Action, this answering defendant adopts its answer to *paragraph* I, II, III, and VIII of the first cause of action and paragraph IV of the fifth cause of action and makes it part of this his answer to said paragraph I of the Nineteenth Cause of Action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the said Nineteenth Cause of Action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTIETH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twentieth Cause of Action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the sixth cause of action and makes it part of this his answer to said paragraph I of the Twentieth Cause of Action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twentieth Cause of Action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-FIRST CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-first cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the seventh cause of action and makes it part of this his answer to said paragraph I of the Twenty-first cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-first cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-SECOND CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-second cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the eighth cause of action and makes it part of this his answer to said paragraph I of the Twenty-second cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-second cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-THIRD CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-third cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the ninth cause of action and makes it part of this his answer to said paragraph I of the twenty-third cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-third cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-FOURTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-fourth cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the tenth cause of action and makes it part of this his answer to said paragraph I of the Twenty-fourth cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-fourth cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-FIFTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-fifth cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the eleventh cause of action and makes it part of this his answer to said paragraph I of the twenty-fifth cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-fifth cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-SIXTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-sixth cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the twelfth cause of action and makes it part of this his answer to said paragraph I of the Twenty-sixth cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-sixth cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-SEVENTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Ansering paragraph I of the Twenty-seventh cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the thirteenth cause of action and makes it part of this his answer to said paragraph I of the Twenty-seventh cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-seventh cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

ANSWERING THE TWENTY-EIGHTH CAUSE OF ACTION, this defendant admits, denies and alleges:

I

Answering paragraph I of the Twenty-eighth cause of action, this answering defendant adopts its answer to *paragraph* I, II, III and VIII of the first cause of action and paragraph IV of the fourteenth cause of action and makes it part of this his answer to said paragraph I of the Twenty-eighth cause of action, the same as if each of said paragraphs have been set out herein in full.

II

Answering paragraph II of the Twenty-eighth cause of action, this answering defendant denies each and every allegation thereof generally and specifically.

WHEREFORE, defendant prays judgment that plaintiffs and each of them take nothing by their complaint and that defendant have judgment for costs and disbursements incurred in this cause.

DOCKWEILER & DOCKWEILER &
BENJAMIN CHIPKIN

By: Benjamin Chipkin

Attorneys for Defendant.

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

J. V. HOGAN, being by me first duly sworn deposes and says: That he is the Receiver of the Anaheim First National Bank, a national banking association, defendant in the above entitled matter; that he has read the foregoing answer and knows the contents thereof and makes this verification on behalf of the said association and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

J. V. Hogan

SUBSCRIBED AND SWORN to before me this 27th day of May 1936.

[Seal] Benjamin Chipkin
Notary Public in and for the County of Los Angeles
State of California

[Endorsed]: Filed May 28, 1936. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J
(No. 33866 SCOCo)

ORDER RE WITHDRAWAL OF FRANK BAUM and JOSEPHINE BAUM AS PARTIES PLAINTIFF

Upon reading the attached document entitled DISMISSAL OF FRANK BAUM AND JOSEPHINE BAUM, and good cause appearing therefor, it is, on motion of Messrs. Dockweiler & Dockweiler and Benjamin Chipkin, attorneys for defendant Anaheim First National Bank, a national banking association, ORDERED AND ADJUDGED that plaintiffs Frank Baum and Josephine BAUM, husband and wife, have, and each of them has, withdrawn as parties plaintiff in said action; and

IT IS FURTHER ORDERED that the cause of action of said plaintiffs Frank Baum and Josephine Baum, husband and wife, set forth in the complaint on file in the above entitled matter herein be, and the same, is hereby, dismissed so far as the same affects and relates to said plaintiffs Frank Baum and Josephine Baum, husband and wife.

Dated the 5 day of June, 1937.

Wm. P. James
United States District Judge

Dismissal entered and recorded Jun 5 - 1937

R. S. ZIMMERMAN,
Clerk

By Murray E. Wire
Deputy Clerk.

The above order is approved as to form, as provided in Rule 44.

Dated: June 2, 1937.

SPARLING & TEEL,
Wm. J. M. HEINZ
and JOSEPH SCOTT

By Wm. J. M. Heinz
(Wm. J. M. Heinz)

Attorneys for plaintiffs Frank Baum and Josephine Baum, husband and wife.

DOCKWEILER & DOCKWEILER AND
BENJAMIN CHIPKIN

By Henry I. Dockweiler

Attorneys for defendant Ana*h*im First National Bank

[TITLE OF DISTRICT COURT AND CAUSE.]

No. 7522-J

(No. 33866 S C O Co)

DISMISSAL OF FRANK BAUM AND JOSEPHINE BAUM

TO R. S. ZIMMERMAN, CLERK, AND TO THE HONORABLE WM. P. JAMES, Judge of the above entitled Court:

Dismissal is hereby made by Frank Baum and Josephine Baum, husband and wife, plaintiffs in the above entitled action of their said cause of action in said matter, and the above entitled court is hereby requested to dismiss said action and the above named clerk is hereby directed to enter the dismissal of said Frank Baum and Josephine Baum in said matter.

SPARLING & TEEL
WM. J. M. HEINZ and
JOSEPH SCOTT
By Wm. J. M. Heinz
Wm. J. M. Heinz
Attorneys for said plaintiffs

[Endorsed]: Filed Jun. 5, 1937. R. S. Zimmerman, Clerk, By Murray E. Wire, Deputy Clerk.

[Title of District Court and Cause.]

NO. 7522-J

WAIVER OF JURY TRIAL

Come now the plaintiffs in the above entitled action, and hereby waive a trial of said action by a jury.

Dated: July 19, 1937.

JOSEPH SCOTT
SPARLING & TEEL
EDWARD C. PURPUS
By Edw. C. Purpus
Attorneys for plaintiff

[Endorsed]: Filed Jul. 20, 1937. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

At a stated term, to-wit: The September Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 10th day of January, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: WM P. JAMES District Judge.

L. J. KELLY, et al.,	)	
	)	
Plaintiffs,	)	No. 7522-J
	)	
vs	)	
	)	
ANAHEIM FIRST NATIONAL BANK, etc., et al.,	)	
	)	
Defendants.	)	

This cause having heretofore been tried before the court, whereupon evidence was received, and after argument on briefs as filed by respective counsel, was submitted for decision; and the court now having considered

the law and the evidence, determines and orders that findings and judgment be entered in favor of the defendants. Particularly, the court determines that the contributions as made by the plaintiffs to the bank were voluntary, both because of the requirement of the law in that respect, and further, because of their acquiescence for a long period of time in the notification given by the Comptroller of the Treasury that such contributions must be so considered when made; further, that other questions aside, no evidence is offered as to any appreciation in the value of the bonds alleged to have been purchased by the plaintiffs, and hence no evidence appears of any legal damage or loss suffered. An exception will be noted in favor of the plaintiffs upon the entry of the findings and judgment as ordered.

At a stated term, to-wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 2nd day of March in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: WM P. JAMES District Judge.

L. J. KELLY, et al,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 7522-J
	)	
ANAHEIM FIRST NATIONAL BANK, a national banking association,	)	
	)	
Defendant.	)	
	)	

This cause having heretofore been tried before the Court, whereupon evidence was introduced for respective parties; thereafter argument was made by briefs duly filed; and thereafter the Court having considered the law and the evidence, directed that findings and judgment be entered in favor of the defendant Anaheim First National

Bank. And now the said defendant by its counsel having presented findings and judgment in written form, to which Wm. J. M. Heinz, Esquire, attorney for plaintiff Ernest F. Ganahl and Charles C. Montgomery, Esquire, with his co-counsel, as attorneys for all remaining plaintiffs except Ernest Ganahl, having filed exceptions to the proposed findings and suggested amendments thereto, all of which have been considered by the Court. And the Court now adopts the findings and judgment as prepared by the defendant bank, and denies the exceptions and proposed amendments of plaintiffs. Findings and judgment are accordingly signed and filed with the Clerk, and an exception is noted in favor of all plaintiffs. Correction was made of the numbering of certain paragraphs of the findings of fact.

[TITLE OF DISTRICT COURT AND CAUSE.]

No. 7522-J

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

The above entitled cause came on for trial on July 20 and 21, 1937, in the above entitled court, before the Honorable William P. James, Judge presiding, the court sitting without a jury, a jury trial having been duly and regularly waived by the respective parties hereto by oral stipulation entered in the minutes of this court and by stipulation in writing filed with this court and the clerk thereof; said trial being had as to all plaintiffs except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been dismissed so far as the same affects and relates to them; Messrs. Joseph Scott, Charles C. Montgomery, Sr. and Charles C. Montgomery, Jr., Edward C. Purpus, W. J. Heinz and A. H. Risse appearing as attorneys for plaintiffs, and Messrs. Dockweiler & Dockweiler, by Henry I. Dockweiler, Esquire, and Benjamin Chipkin, Esquire, appearing as attorneys for defendant Anaheim First National Bank, a national banking association; and evidence, both oral and documentary, having been introduced on behalf of the respective parties and the cause having been argued and submitted for decision, the court now makes its findings of fact and conclusions of law as follows, to-wit:

FINDINGS OF FACT

I

That it is true that plaintiff F. K. Day is now, and since a time prior to the commencement of the above action has been, dead.

II

That it is true that plaintiff Minnie Palmer was formerly known as Minnie Baxter.

III

That it is true that defendant Anaheim First National Bank is now, and at all times mentioned in the complaint on file herein was, a national banking association organized and existing under the statutes of the United States known as the National Bank Act, that said Bank has at all times had its place of business at Anaheim, Orange County, State of California, that on January 15, 1934, said Bank was declared insolvent by the Comptroller of the Currency of the United States, that on said date said Comptroller appointed J. V. Hogan as receiver of said Bank, and that ever since said date said Hogan has been and now is the duly appointed, qualified and acting receiver of said Bank.

IV

That it is true that on or about November 18, 1931 a depreciation existed in the bond account of said Bank, that at said time F. K. Day and all of the plaintiffs named in said complaint, except M. E. Day and Josephine Baum, were shareholders in said Bank; but it is not true that on or about said date or at any other time said F. K. Day and all of said plaintiffs, except M. E. Day and Josephine Baum, together with other sharehold-

ers of said Bank, or any of them, entered into an agreement with said Bank whereby the said other shareholders of said Bank and said F. K. Day and all of the said plaintiffs, except M. E. Day and Josephine Baum, or any of them, agreed to purchase from said Bank said depreciation then existing in said bond account; and it is not true that by the terms of any such agreement said Bank agreed to pay from time to time to the aforesaid parties, or to any of them, any prorata decrease which might from time to time appear in said depreciation of said bond account.

V

That it is not true that in any such agreement, as set forth in said complaint or otherwise, the following persons respectively agreed to pay to said Bank the following, or any other, sums:

L. J. Kelly	$ 4,900.00
F. H. Dolan	32,500.00
Ben Baxter	1,750.00
S. James Tuffree	3,500.00
Ed. Kelly	9,000.00
F. A. Yungbluth	1,700.00
Minner Palmer (formerly known as Minnie Baxter)	3,850.00
M. Del Giorgio	875.00
Jennie Pomeroy	3,500.00
J. W. Truxaw	1,750.00
J. J. Dwyer	1,750.00
F. K. Day	875.00
Ernest F. Ganahl	1,750.00 and
Frank Baum	5,250.00;

and it is not true that pursuant to any such agreement said persons, excepting Ernest F. Ganahl and Frank Baum, on or about July 17, 1931, paid to said Bank the sums hereinabove set opposite their respective names and it is not true that pursuant to any such agreement said Ernest F. Ganahl on or about July 17, 1931 executed his promissory note for $1,750.00 to said Bank or that, pursuant to such agreement he made any payments of principal or interest on such a note; and it is not true that pursuant to any such agreement said Frank Baum executed his promissory note dated December 19, 1932 for $5,250.00 to said Bank or that pursuant to such agreement he paid interest on said note, or that, pursuant to such agreement, plaintiffs Frank Baum and Josephine Baum on or about May 9, 1933 executed and delivered to said Bank a certain trust deed on the property described in the fourteenth count of the complaint on file herein; that it is true that on or about July 17, 1931 the above named persons, except Ernest F. Ganahl and Frank Baum paid to said Bank the sums of money hereinabove set opposite their respective names, and it is further true that on or about July 7, 1931, said Ernest F. Ganahl executed to said Bank his promissory note for $1,750.00, and it is further true that said Frank Baum executed to said Bank his promissory note dated December 19, 1932 for $5,250.00, and it is also true that subsequently said Frank Baum and Josephine Baum executed and delivered to said Bank a trust deed covering certain property described in the fourteenth count of said complaint, but said payments were made and said notes and trust deed were executed and delivered by said persons as voluntary contributions to said Bank and said Bank was not and is not obligated under any such agreement or other-

wise to repay said sums or any part thereof, and said Bank has not repaid the same or any part thereof.

VI

~~VII~~

That it is true that on or about January 15, 1934 said Hogan, as such receiver, took possession of all the assets of said Bank, including said bond account, and has been and is engaged in liquidating the same.

VII

~~VIII~~

That it is not true that by reason of the appointment of said receiver and the liquidation of the assets of said Bank, including said bond account, or otherwise, there has been any failure of consideration, wholly or partially, for the respective payments hereinabove set forth as having been made by said persons to said Bank; and it is not true that by reason of any matters or things set forth in plaintiffs' complaint said Bank has become and is now, or ever was, indebted to any of said persons above named or to any of the plaintiffs herein for or on account of any sums of money whatsoever, either as principal or interest.

VIII

~~IX~~

That it is true that on or about May 31, 1934 said Comptroller of the Currency published his notice requiring all persons having claims against said Bank to present their said claims to said Hogan, as such receiver, with the legal proof thereof within three months from said date.

IX

~~X~~

That it is true that on or about August 23, 1934 said L. J. Kelly, F. H. Dolan, Ben Baxter, S. James Tuffree, Ed Kelly, F. A. Yungbluth, Minnie Palmer (formerly known as Minnie Baxter), M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw, J. J. Dwyer, Ernest F. Ganahl, Frank Baum and Josephine Baum, presented to said Hogan, as such receiver, their respective claims for the respective sums of money so paid by them to said Bank as hereinabove set forth, plus interest thereon; and it is also true that on or about August 23, 1934, plaintiff M. E. Day presented to said Hogan, as such receiver, her claim for said sum of $875.00 paid to said Bank by said F. K. Day, with interest thereon, all in the manner and form required by said Comptroller of the Currency; and it is also true that none of said claims, or any part thereof, has been paid; but it is also true that none of said claims was a valid or proper claim against said Bank or in the matter of the receivership of said Bank.

X

~~XI~~

That it is not true that within two years prior to the preparation of the complaint on file herein, or within two years prior to the filing thereof, the persons hereinabove in Finding No. V named loaned respectively to said Bank the sums respectively set after their names in said Finding No. V; and it is not true that said Bank received said respective sums, or any of said sums or any part thereof, for the use and benefit, or use or benefit, respectively of said persons, or any of said persons, whose names are set forth in said Finding No. V; and it is not true that said Bank promised to repay said sums on de-

mand or otherwise; and it is true that while said sums have not been repaid to any of said respective persons, although demand has been made therefor, it is also true that said Bank is in no way obligated, in the matter of said receivership or otherwise, to repay said sums or any part thereof to said persons or to any persons or person whomsoever.

XI
~~XII~~

It is also true that on various occasions and at various times between July 1930 and November 1931 said Comptroller of the Currency, through his duly authorized deputy comptrollers, notified and instructed said Bank, and the officers and directors thereof, that payments made to repair the impaired capital of said Bank must be considered as voluntary and unconditional contributions, without obligation of repayment; that each and all of said persons who made said payments hereinabove referred to acquiesced by lapse of time and otherwise in said notification and instruction of said Comptroller of the Currency; that said payments were payments made to repair the impaired capital of said Bank and were, each and all, voluntary and unconditional contributions, without any obligation whatsoever on the part of said Bank to repay same; that the law requires all payments such as those made by plaintiffs under the circumstances shown by the evidence herein to be voluntary and unconditional and without any obligation whatsoever on the part of the bank to repay same.

XII

~~XIII~~

That it is true that no evidence has been presented to this court proving any appreciation in the value of the bonds in said bond account, the depreciation in which bond account is alleged by plaintiffs to have been purchased by plaintiffs or, in the case of plaintiff M. E. Day, her predecessor in interest F. K. Day; and that no evidence has been presented to this court of any legal damage or loss suffered or sustained by plaintiffs or any of them.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the court finds:

I

That there did not exist any contract between said Bank and the persons who made the payments to said Bank hereinabove set forth whereunder and whereby said Bank was obligated to repay said sums or any part thereof; that said payments were voluntary and unconditional contributions to said Bank, and were such because of the requirement of the law in that respect and because of the acquiescence by said persons for a long period of time in the notification and instruction given by the Comptroller of the Currency that such contributions must when made be considered as voluntary and unconditional contributions without obligation on the part of the Bank to repay same.

II

That none of the plaintiffs herein is entitled to recover any sum so paid to said Bank or any promissory note

given to said Bank to cover his contribution, as hereinabove set forth, either under causes of action numbers I to XIV, inclusive, or under causes of action numbers XV to XXVIII, inclusive, of plaintiffs' complaint on file herein.

III

That defendant Anaheim First National Bank, a national banking association, is entitled to judgment herein, together with its costs of suit.

Let judgment be entered in conformity herewith.

Dated this 28 day of February, 1938.

Wm P. James
Judge of said District Court

Not Approved as to form, as provided for in Rule 44:

JOSEPH SCOTT,
CHARLES C. MONTGOMERY, Sr.,
CHARLES C. MONTGOMERY, Jr.,
EDWARD C. PURPUS,
By Charles C. Montgomery
Attorneys for Plaintiffs except Ganahl Objections herewith

Wm. J. M. Heinz
(Wm. J. M. Heinz)
Attorney for plaintiff Ernest Ganahl

Objections served and filed herewith.

W J M H.

[Endorsed]: Filed Mar. 2, 1938. R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, et al, Plaintiffs, vs. ANAHEIM FIRST NATIONAL BANK, a national banking association, et al, Defendants.	)	NO. 7522-J JUDGMENT

The above-entitled action came on for trial on July 20 and 21, 1937, in the above entitled court, before the Honorable William P. James, Judge Presiding, the court sitting without a jury, a jury trial having been duly and regularly waived by the respective parties hereto by oral stipulation entered in the minutes of this court, and by stipulation in writing filed with this court and the clerk thereof; said trial being had as to all plaintiffs except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein on June 5, 1937, been dismissed so far as the same affects and relates to them; Messrs. Joseph Scott, Charles C. Montgomery, Sr., Charles C. Montgomery, Jr., Edward C. Purpus, W. J. Heinz and A. H. Risse, appearing as attorneys for plaintiffs, and Messrs. Dockweiler & Dockweiler, by Henry I. Dockweiler, Esquire, and Benjamin Chipkin, Esquire, appearing as attorneys for defendant Anaheim First National Bank, a national banking association, and evidence, both oral and documentary, having been introduced on behalf of the respective parties and the cause having been argued

and submitted for decision, and the court having made its findings of fact and conclusions of law and being fully advised in the premises:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover nothing from defendant Anaheim First National Bank, a national banking association, by virtue of said action, that the same be dismissed, and that defendant Anaheim First National Bank, a national banking association, have and recover its costs of suit herein taxed at $50.10.

Dated: This 28 day of February, 1938.

Wm. P. James

Judge of the District Court of the United States, Southern District of California, Central Division.

Approved as to form under Rule 44 this 16th day of February, 1938:

JOSEPH SCOTT,
CHARLES C. MONTGOMERY, SR.,
CHARLES C. MONTGOMERY, JR.,
EDWARD C. PURPUS
By Charles C. Montgomery

Attorneys for plaintiffs except as to plaintiff Ernest F. Ganahl represented by W. J. Heinz and A. H. Risse.

Wm. J. M. Heinz
(Wm. J. M. Heinz)

Attorney for plaintiff Ernest Ganahl.

Judgment entered and recorded Mar 2, 1938. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy Clerk.

[Endorsed]: Filed Mar. 2, 1938. R. S. Zimmerman, Clerk, By Murray E. Wire, Deputy Clerk.

[Title of District Court and Cause.]

NO. 7522-J
(In Law)

BILL OF EXCEPTIONS

Be it remembered that on the 20th and 21st days of July, 1937, the above-entitled cause came on for trial before this Court, Honorable Wm. P. James, judge presiding, the court sitting without a jury, a jury trial having been waived by counsel for the respective parties.

The case was submitted upon written briefs and oral testimony and documentary evidence.

Plaintiffs (except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been dismissed so far as the same affects and relates to them) appeared by Messrs. Joseph Scott, Charles C. Montgomery, Sr., Charles C. Montgomery, Jr., Edward C. Purpus, W. J. M. Heinz and A. H. Risse and the defendant appeared by Messrs. Dockweiler & Dockweiler, by Henry I. Dockweiler, Esquire, and Benjamin Chipkin, Esquire.

EXCEPTION NO. *1*

The Court on January 10, 1938 made and entered an opinion and a Minute Order wherein the Court determined "That the contributions as made by the plaintiffs were voluntary, both because of the requirements of the

law in that respect, and further because of their acquiescence for a long period of time in the notification given by the Comptroller of the Currency that such contributions must be so considered when made; further, that other questions aside, no evidence is offered as to any appreciation in the value of the bonds alleged to have been purchased by the plaintiffs, and hence no evidence appears of any legal damage or loss suffered." The Court in the said Minute Order stated that an exception would be noted in favor of the plaintiffs upon the entry of the Findings and Judgment, and ordered the defendants to present a Judgment for defendants and Findings under Rule 44.

———...———

EXCEPTION NO. 2

On the 16th day of February, 1938, Proposed Findings of Fact, Conclusions of Law and Judgment for the defendants were presented. Counsel for plaintiffs filed objections to the said Findings of Fact, Conclusions of Law and Judgment but the Court disallowed the Objections and signed the same, but noted an exception in favor of the plaintiffs' Objections to Findings of Fact and Conclusions of Law as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, et al., Plaintiffs, vs. ANAHEIM FIRST NATIONAL BANK, a national banking association, et al., Defendants.	NO. 7522-J OBJECTIONS TO FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Findings IV and V are not justified by the Memo of Decision and are contrary to law and fact, a contract having been made.

Finding No. VI does not appear. An error in numbering. All after V should be re*me*mbered.

Finding VIII (should be VII) is not supported by the law or the evidence. It is contrary to the lately decided case of Briney v. Mortimer. (C. C. A.) 93 F. (2) 800.

Finding XII (should be XI) is contrary to the undisputed evidence as to Minnie Palmer, Jennie Palmer, M. Del Giorgio and F. A. Y*o*ungbluth.

Finding XIII (should be XII) is contrary to the evidence, showing an appreciation of some of the bonds in the list.

Exception is taken to each unfavorable ruling and finding.

CHARLES C. MONTGOMERY
EDW. C. PURPUS
JOSEPH SCOTT
CHARLES C. MONTGOMERY, JR.
Attorneys for plaintiffs except Ernest Ganahl"

EXCEPTION NO. 3.

Counsel for plaintiffs (except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been dismissed so far as the same affects and relates to them) on January 19, 1938, filed a Motion for New Trial and Points and Authorities in Support of Motion for New Trial, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL,	NO. 7522-J
Plaintiffs,	Motion for New Trial
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, et al,	
Defendants.	

COME NOW the plaintiffs, F. H. DOLAN, S. JAMES TUFFREE, ED KELLY, F. A. YOUNGBLUTH, MINNIE PALMER, formerly known as M.

BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, ERNEST GANAHL and L. J. KELLY, and move for a New Trial of the above-entitled action, on the following grounds, to-wit:

1. Insufficiency of the evidence to justify the decision denying plaintiffs relief, particularly in determining that the contributions as made by the Plaintiffs to the Bank were voluntary, both because of the requirement of the law in that respect, and further, because of their acquiescence for a long period of time in the notification given by the Comptroller of the Treasury that such contributions must be so considered when made.

2. That the decision is against the law in finding as to the plaintiffs that their contributions were voluntary.

3. That the decision is against law in finding ". . . no evidence is offered as to any appreciation in the value of the bonds alleged to have been purchased by the plaintiffs, and hence no evidence appears of any legal damage or loss suffered."

4. Error in law occurring at the trial, excepted to by plaintiffs now making the application, in receiving in evidence and considering the correspondence between the Comptroller of the Treasury and the Anaheim First National Bank, as immaterial, irrelevant and incompetent, and particularly as having no bearing on any of the issues in so far as the Plaintiffs Minnie Palmer, M. Del Giorgio and Jennie Palmer and F. A. Youngbluth are concerned, they having no knowledge or notice of anything to put them on inquiry as to any such correspondence with the Comptroller of the Treasury.

5. That the decision is against law in finding against the plaintiffs that "no evidence appears as to any legal

damage or loss suffered." The failure of the Bank to continue as a going concern violated (Plaintiffs) purchasers contractual rights.

Dated: Los Angeles, California, January 18, 1938.

EDW. C. PURPUS
CHARLES C. MONTGOMERY
JOSEPH SCOTT
CHARLES C. MONTGOMERY JR.
Attorneys for Moving Plaintiffs."

and the said Motion for New Trial was duly noticed for hearing on the 25th day of April, 1938, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, Plaintiffs, vs. ANAHEIM FIRST NATIONAL BANK, a National Banking Association, et al., Defendants.	NO. 7522-J NOTICE OF HEARING OF MOTION FOR NEW TRIAL

TO DEFENDANT ABOVE NAMED, and to DOCKWEILER & DOCKWEILER, and BENJAMIN CHIPKIN, ESQ. its attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the plaintiffs F. H. Dolan, S. James *Truffee,* Ed Kelly, F. A. Youngbluth, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw, J. J. Dwyer, Ernest Ganahl and L. J. Kelly, on the 25th day of April, 1938, in the Court Room of Hon. Wm. P. James, District Judge, located at Room 582 Pacivic Electric Building, Los Angeles, California, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard, will move the above named Court to hear and consider the Motion for New Trial heretofore filed herein on or about January 19, 1938. Said Motion will be made on the Minutes of said Court, on said Motion for New Trial, and upon the Points and Authorities in support thereof filed contemporaneously therewith.

Dated: April 11, 1938.

EDW. C. PURPUS
CHARLES C. MONTGOMERY
JOSEPH SCOTT
CHARLES C. MONTGOMERY JR.
Attorneys for Moving Plaintiffs."

The Court on May 13, 1938, caused his Minute Order to be entered denying plaintiffs' Motion for New Trial, but noted an exception in behalf of the plaintiffs. Copy of said Minute Order is as follows:

"(MINUTE ORDER)

L. J. KELLY, et al.,)
Plaintiffs,)
vs.)
ANAHEIM FIRST NATIONAL BANK,) NO. 7522-J
a national banking association, et al.,)
Defendants.)
)

A Motion made on the part of the plaintiffs for the granting of a new trial herein having been presented to the court, and after argument of counsel, submitted for ruling; and the court now having considered the matter, determines that the motion for a new trial should be denied. It is so ordered, and an exception is noted in behalf of the plaintiffs.

(Entered on Judge James' Minutes' May 13, 1938.)

Copies mailed to:

Edward C. Purpus, Esq.,
430 L. A. Stock Exchange Bldg.,
639 South Spring Street,
Los Angeles, California.

Charles C. Montgomery, Esq.,
810 Title Guarantee Bldg.,
411 West Fifth St., Los Angeles.

Joseph Scott, Esq.,
1001 Black Bldg., 357 So. Hill St.,
Los Angeles, California.

Dockweiler & Dockweiler, Esqs.,
For Henry I. Dockweiler, Esq.,
1035 Van Nuys Building,
210 West Seventh Street,
Los Angeles, California."

EXCEPTION I-A

Findings and Judgment.

———...———

The Evidence hereafter will refer to Exceptions No. 1, 1-A, 2 and 3, as well as the Exceptions separately noted.

———...———

I

That

R. FOSTER LAMM,

a witness for plaintiffs testified in part as follows: That R. FOSTER LAMM was duly appointed as Bank Examiner by the Comptroller of the Currency; that R. FOSTER LAMM, one of the above named bank examiners upon examining the assets of the ANAHEIM FIRST NATIONAL BANK, a national banking association, notified the directors thereof that the bond account of said bank was deficient; that thereupon the directors inquired of the said R. FOSTER LAMM what could be done about the matter; that the said R. FOSTER LAMM then suggested that they follow the same procedure which he had caused the First National Bank of Huntington Beach, California, to follow in 1929, namely, that the directors purchase the said depreciation in the bond account which would give them a possibility of return of the money that they put in the surplus account or undivided profit account.

(Testimony of R. Foster Lamm)

As to the circumstances surrounding the so-called contributions (Page 75 of Reporter's Transcript of Testimony and Proceedings on Trial, reading from Line 8 to Line 21, inclusive), quote:

"A Yes, sir. As I recollect the whole thing, we held a board meeting, called a board meeting following the completion of the examination. What the figures were of the losses I don't remember. We discussed ways and means to restore the capital impairment. We discussed the possible effect of an assessment, and finally talked about a contribution. The question was raised at that time, if the directors contributed money to the bank would there be any chance of them getting it back again. We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation of the bond account. That would give them a possibility of return of the money that they put in the surplus account or undivided profit account."

———...———

"THE COURT: Q In the instance that you have given was it entered on the records of the bank?

A Yes, sir; it had to be.

Q BY MR. DOCKWEILER: How was it entered?

A The bond was charged down and the undivided profits to the new carrying value.

Q To its carrying value?

A Yes, sir. That would deplete the undivided profits account first, and then your surplus, and then into the capital. Before it gets into the capital the contribution goes into the undivided profit account and restores the undivided profit account. In other words, they buy the charged-off assets.

(Testimony of R. Foster Lamm)

Q But the bonds are, of course—

A (Interrupting): Makes the recovery out of the return of the charged-off assets." (Reporter's Transcript of Testimony of Proceedings on Trial, Line 17 on Page 82 to Line 6 on Page 83, inclusive.)

"Q Now, you say that it was one of the customary methods of repairing impaired capital for anyone interested in the bank, like stockholders or directors or officers, buying bad assets?

A That is correct.

Q Yes. Now, in your experience as a bank examiner, commencing with 1921 and ending in 1930, I take it, at least with reference to this bank—

A '31, I think.

Q —'31, did it ever come to your attention that the capital, the impaired capital of a national bank was ever repaired by any such method as the method contemplated by this arrangement, namely, buying the depreciated bond account?

A Yes.

Q In what banks?

A First National Bank of Huntington Beach.

Q Was that within your jurisdiction?

A Yes, sir.

Q Who suggested that to that national bank?

A I think I did.

Q You did. Now, isn't it a fact, Mr. Lamm, that this is your own idea, and whatever merit or demerit attaches to it as a formula for repairing the impaired capital of a bank is your own?

A I think maybe I claim it.

(Testimony of R. Foster Lamm)

Q You would claim it. Do you know whether or not as a matter of policy of the Treasury Department that was one of the recognized methods?

MR. MONTGOMERY: I object to that as calling for a conclusion of the witness.

THE COURT: No. He can state whether he has ever had the approval of the department in his written reports as to any such plan.

Q BY MR. DOCKWEILER: Yes. Using the Judge's words in my question, what would your answer be?

A Well, I would have to say that they did not disapprove it when it worked.

Q They did not disapprove it. Did you ever specifically set it before them and ask for their approval or disapproval?

A Only as an accomplished fact.

Q Only as an accomplished fact, and that with reference to what?

A First National Bank of Huntington Beach.

Q Yes. And when was that submitted to the department?

A Oh—

Q In what year?

A Probably 1929, I imagine.

Q 1929. Did you ever have an answer from the Comptroller's office as to that being a proper method of repairing impaired capital?

A I never.

(Testimony of R. Foster Lamm)

Q No answer one way or the other?

A I do not remember that there was." (Reporter's Transcript of Testimony of Proceedings on Trial, Line 6 on Page 80 to Line 10 on Page 82, inclusive.)

II

Following said meeting and discussion with said Bank Examiner, R. Foster Lamm, Plaintiffs' Exhibit 4 hereinafter set forth in full, was signed and the respective amounts of money were paid by such signer as follows:

Wm. A. Dolan, Cash	$32,500
F. H. Dolan, Cash	32,500
Ben Baxter, Cash	1,750
L. J. Kelly, Note of 10/10/32	4,900
Ernest F. Ganahl, Note of 10/7/32	1,750
Frank Baum, Note of 9/19/32	5,250
J. W. Brunsworth, Note of 10/6/32	5,250
S. James Tuffree, Note of 9/29/32	3,500
Ed Kelly, Note of 10/7/32	9,000
Fred & Sophia Rimpau, Cash	3,675
F. A. Yungbluth, Note of 11/32/32	1,750
J. K. Day, Note of 10/8/32	875
Minnie Baxter, Note of 7/8/32	3,000
Cash	850
M. Del Giorgio, Note of 12/14/32	875
Jennie Pomeroy, Cash	2,000
Note of 7/11/32	1,500
D. A. Woodward, Note of 11/22/32	1,225
J. W. Truxaw, Note of 10/28/32	1,750
J. J. Dwyer	1,750

(Testimony of William A. Dolan)

That

WILLIAM A. DOLAN,

a witness on behalf of plaintiffs testified in part as follows, quote:

"Q Did you talk to any other bank examiner before purchasing this depreciation, and explain the situation to him?

A No; I did not— I think that later on, after the money had been put up, Mr. Waldron was the successor of Mr. Lamm in our territory, and I told him what we had done; and the records show that Mr. Waldron approved our action. That was the understanding of the way the information was given to the Comptroller's office." (Reporter's Transcript of Testimony of Proceedings on Trial, Line 23 on Page 60 to Line 5 on Page 61, inclusive.)

———...———

"Q BY MR. MONTGOMERY: What did you tell Mr. Waldron the plan was?

A I told him that Mr. Lamm had suggested that the directors and some of the stockholders purchase the bond depreciation and if the bonds appreciated, why, we were to be able to get our money back; and Mr. Waldron seemed to think that that was O. K. He said—

Q Not what he seemed to think. What did he say?

A He said he did not see why it would not work out all right; and he said to go ahead, and on the—I think it was June the 22nd, I wrote the Comptroller of the Currency to that effect." (Reporter's Transcript of Testimony of Proceedings on Trial, Lines 7 to 18 inclusive, on Page 64.)

(Testimony of William A. Dolan)

EXCEPTION No. 4

On cross-examination, counsel for the defendant was permitted to inquire into and introduce evidence of a transaction which took place a year prior to the transaction out of which the cause of action in this case arose. On Page 69 of Reporter's Transcript of Testimony and Proceedings on Trial, Lines 7 to 24, inclusive, we find the objection of counsel for the plaintiffs overruled and exception noted as follows:

"MR. MONTGOMERY: I would like to have counsel state what the purpose of this examination is and what item we are going into, because this is long prior to the transaction in question.

MR. DOCKWEILER: Well, showing, your Honor, that the gentleman knew long prior—a year prior, from the records themselves, that an impaired capital could only be corrected in one of several ways specifically set forth in this very letter that I am about to introduce.

MR. MONTGOMERY: This party is not a plaintiff.

MR. DOCKWEILER: But he has testified on behalf of the contributors, or whatever you wish to call the gentlemen who signed this agreement, and he says that that was their understanding.

THE COURT: That letter is addressed to whom?

MR. DOCKWEILER: "Board of Directors, Anaheim National Bank."

THE COURT: Objection overruled and exception noted."

(Testimony of William A. Dolan)

EXCEPTION No. 5

Again on Pages 71 and 72 of Reporter's Transcript of Testimony and Proceedings on Trial, we find two letters under date of July 2, 1930 and July 17, 1930, introduced into evidence by counsel for the defendant to which counsel for the plaintiffs objected but the Court saved the objections and noted an exception:

"MR. DOCKWEILER: At this time defendant introduces as defendants' Exhibit—

THE CLERK: F.

MR. DOCKWEILER: —F, a copy of this same letter of July 2, 1930, addressed by E. H. Gough, Deputy Comptroller, to Board of Directors, Anaheim First National Bank; and I will ask opposing counsel whether it will be agreeable to introduce the copy.

MR. MONTGOMERY: It is agreeable to introduce the copy, and we will make the objection that it relates to an entirely different transaction and has no bearing upon the issues of this case, immaterial and irrelevant.

THE COURT: The objection will be saved and exception noted, and we will see what we make out of it.

MR. DOCKWEILER: Defendant introduces as Defendants' Exhibit G the reply of Mr. W. A. Dolan, as president of the bank, to E. H. Gough, Deputy Comptroller, under date of July 17, 1930; and I will ask opposing counsel whether it will be stipulated that the copy may be introduced in evidence.

MR. MONTGOMERY: Yes; on the same basis as the other letter. Now, Mr. Lamm is here. May we interrupt the proceedings and call Mr. Lamm?" (Reporter's Transcript of Testimony and Proceedings on Trial, Lines 17 on Page 71 to Line 13 on Page 72, inclusive.)

(Testimony of William A. Dolan)

In relation to the two letters just mentioned, the resolution which was referred to in one of the letters, was read into the evidence. It appears on Page 87 of Reporter's Transcript of Testimony and Proceedings on Trial, Lines 20 to 26, inclusive, as follows:

" 'It was moved by J. J. Dwyer, and seconded by Fred C. Rimpau and carried, that a reserve fund be created by voluntary contribution of stockholders to offset depreciation in bond account, and that stockholders contributing will be reimbursed from said reserve fund which will be built up by appreciation in the bond account or by any other earnings in the bank.' "

The above resolution was passed at a meeting of the Board of Directors on the 29th day of May, 1930.

In relation to a former transaction the witness testified that the stockholders and directors, who had in 1930 contributed the sum of $30,000 to take up the depreciation in the bond account, and in fact they had their contributions refunded to them out of the amounts paid into the bank in the transaction involved in this case. Quoting from Pages 101 and 102 of the Reporter's Transcript of Testimony and Proceedings on Trial, Lines 13 to 26 on Page 101, Line 1 on Page 102, inclusive:

"Q This $30,000 in notes that was put up, that whole transaction was cancelled, wasn't it?

A Yes.

Q And the notes were taken up out of the proceeds of this second—

A Purchase.

Q Purchase?

A Yes.

(Testimony of S. James Tuffree)

Q And was any money put up on the $30,000 deal? Did Mr. Kelly put up some which was repaid to him?

A No; that was just notes, all notes.

Q All notes?

A Yes.

Q And they were cancelled?

A Yes."

———...———

EXCEPTION No. 6

S. JAMES TUFFREE,

a witness for plaintiffs testified in part as follows, on cross-examination:

"Q Yes. Well, I will refer you to the minutes of the meeting of September 17, 1931, a little over a year later. For the purposes of refreshing your recollection, Mr. Tuffree, I expose to you what purports to be the minutes of the meeting of the directors of September 17, 1931, and I will ask you whether or not you recall having been present at that meeting?

MR. MONTGOMERY: I object to that as subsequent to the transaction in question, and unless it amounts to an interpretation of what had previously taken place it is immaterial, irrelevant and incompetent.

MR. DOCKWEILER: That is what we claim it to be, a matter of interpretation, as it was a matter of continuous correspondence between the Comptroller and—

THE COURT: We will hear it and the objection may be overruled and exception noted." (Reporter's

(Testimony of S. James Tuffree)

Transcript of Testimony and Proceedings on Trial, Lines 18 to 26 inclusive on Page 28 and from Lines 1 to 8 inclusive on Page 29.)

Again on Pages 33 and 34 of Reporter's Transcript of Testimony and Proceedings on Trial, we find this witness cross-examined as to a letter dated August 20, 1931, addressed to the Board of Directors of the Anaheim First National Bank by the Deputy Comptroller, E. H. Gough. Counsel for the plaintiffs made the objection to the admission and line of cross questioning on the ground that this letter was written subsequent to the time when the transaction out of which the cause of action in this case arose took place. We quote from Line 13 to Line 26, inclusive, on Page 33, and from Line 1 to Line 16½ on Page 34 of Reporter's Transcript of Testimony and Proceedings on Trial:

"I would like to read those two paragraphs in order to ask you some questions. Reading from the August 20th letter of the Deputy Comptroller Gough to the Board of Directors of the Anaheim First National Bank.

'A Capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in this report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash, and $41,875 in the form of fourteen ninety-day notes. *They* were still eighteen stockholders to interview and obtain contributions from.'

(Testimony of S. James Tuffree)

Then the fourth paragraph of the same letter:

'Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without the expectation of reimb*ru*sement. Please advise in your reply to this letter that you have the correct understanding in this regard.'

Now, Mr. Tuffree, was—

MR. MONTGOMERY: In order to keep my record straight, may it be understood that my objection runs to this letter as being subsequent?

THE COURT: Yes.

MR. MONTGOMERY: And not binding upon us?

THE COURT: It will be so agreed and exception will be carried in the record in your favor."

———...———

EXCEPTION No. 7

Again on Page 40 of Reporter's Transcript of Testimony and Proceedings on Trial, the following colloquy is found. Quote:

"MR. DOCKWEILER: At this time we should like to introduce as Defendant's Exhibit C the minutes of the meeting of the Board of Directors held November 19, 1931, in the form of a copy from the minute book.

MR. MONTGOMERY: We have no objection to the copy, but we make the same objection that it is subse-

(Testimony of S. James Tuffree)

quent and is irrelevant, incompetent and immaterial, an attempt to change the contract, or, rather, it is an item of evidence attempting to change the contract that actually was made.

THE COURT: I will let the exception show and the objection be presently overruled. I expect to hear you on the argument on all those questions, nevertheless." (Reporter's Transcript of Testimony and Proceedings on Trial, Lines 12 to 23, inclusive, on Page 40.)

———...———

EXCEPTION No. 8

On Pages 43 and 44 of Reporter's Transcript of Testimony and Proceedings on Trial, the following colloquy is found:

"MR. DOCKWEILER: At this time for the purposes of the record, having already introduced the copy of the minutes, we offer as Defendant's Exhibit 4 a copy of the letter dated October 30, 1931, addressed by Deputy Comptroller Gough to Board of Directors of Anaheim First National Bank.

THE COURT: Subject to the same objection and exception.

MR. MONTGOMERY: Yes, your Honor." (Reporter's Transcript of Testimony and Proceedings on Trial, Lines 18 to 24, inclusive, on Page 43.)

———...———

(Testimony of S. James Tuffree)

EXCEPTION No. 9

On Page 45 of Reporter's Transcript of Testimony and Proceedings on Trial, the following testimony and evidence is found:

"Q Having been advised by the Comptroller's office of what their position was on repairing of impaired capital, did you ever do anything to attempt to advise the Comptroller's office that you had bought what you called the bond depreciation and you expected to get reimbursement of your contribution or payment, whatever you wish to call it, from appreciation in the bond account if appreciation ever occurred?

MR. MONTGOMERY: Well, I object to that as immaterial, irrelevant and incompetent, and also as already having been answered. We have a letter here from the president stating what the basis of contributions was, or, rather, of the purchase.

MR. DOCKWEILER: Your Honor, I have in mind that this gentleman was in a special fiduciary capacity; he was a director of a national bank. As a director he was not dealing at arm's length with the Comptroller but as a director of a national bank. He was under the same obligation that any other director or officer of the bank would be, having the destinies of the bank in its hands and being in relationship constantly with the bank examiner and with the Comptroller's office, to make clear disclosure to the Comptroller of matters which vitally affected the capital of the bank. And for this reason, may it please the court, where a loan is made of money to the bank with a string attached to it, or a condition

of any sort, we all know that that is a liability of the bank which must ultimately be paid. It is only in the event that it is a voluntary contribution that it meets the requirements of the Comptroller's office that the capital be so much and unimpaired and maintained at that same unimpairment. If these are loans or advancements or obligations of the bank, you see, they do not meet the requirement that there be a source, an aggregate, a reservoir of money called "the capital" which is available to pay creditors doing business with the bank. And our position is that every director is in such a fiduciary capacity that he must not permit the Comptroller's office, if the Comptroller asks a specific question, sets forth conditions and so on—must not permit him or lull him into a sense of security that the bank has been repaired as to impaired capital when, in point of fact, the Comptroller would consider that it had not been. And that is why I asked that question.

MR. MONTGOMERY: The president has already advised the Comptroller on September 8th the following stockholders purchased the depreciation, with the understanding that the bonds were to be held or exchanged with a view of the same liquidating the amounts subscribed.

MR. DOCKWEILER: Yes.

MR. MONTGOMERY: I do not think it is incumbent upon us to go any further. We have already told what our position was.

MR. DOCKWEILER: And then you have that subsequent reply, stating clearly what the Comptroller's office would regard as only a sufficient and adequate—what they would call "contribution" to repair the impaired capital;

(Testimony of William A. Dolan)

and I am asking now whether—we get along into November—whether he ever did anything to make it clear that these gentlement were not making a voluntary contribution without expectation of reimbursement.

MR. CHIPKIN: May I add something there? This gentleman is a party plaintiff, and certainly, he, himself, must have shown that he requested the money back or that he did not approve that conduct of the directors in not calling attention of the Comptroller to the fact that he did not approve of that kind of an agreement.

THE COURT: I will allow him to answer, with the exception noted to the ruling." (Reporter's Transcript of Testimony and Proceedings on Trial, from Line 17 on page 45 to Line 5 on Page 48, inclusive.)

III

Said

WILLIAM A. DOLAN,

President of Anaheim First National Bank, further testified as follows: That the various amounts alleged to have been loaned to the bank as set forth in the original complaint in this action were in fact paid in, and that no part thereof had ever been repaid to any of the plaintiffs and appellants herein. Quote:

"Q BY MR. DOCKWEILER: Having in mind these letters received by the board of directors, addressed to the board of directors of the bank, did it ever occur to you that the Comptroller of the Currency at Washington was insisting that whatever was gathered together in the way of additional capital for the repairment of the im-

(Testimony of William A. Dolan)

paired capital should be free, untrammeled, unconditional, and wasn't that a matter of discussion between you men?

A It might have been up for discussion, but we had already made this loan to the bank in order to take care of that depreciation, and the discussion in regard to it in view of these letters was nothing more or less than telling us that after we had already made that loan in good faith—" (Reporter's Transcript of Testimony and Proceedings on Trial, Lines 9 to 21, inclusive, on Page 42.)

Plaintiff's Exhibits I, II and IV, follows:

"Plaintiffs' Exhibit 1

"Minute Record

Meeting Held on the 18 day of June, 1931.

The regular monthly meeting of the Board of Directors of the Anaheim First National Bank was held on the above date, President Wm. A. Dolan, presiding:

Directors present were:

Wm. A. Dolan	F. H. Dolan
J. H. Brunworth	L. J. Kelly
Ed Kelly	Frank Baum
F. G. Rimpau	Ben Baxter
S. James Tuffree	Ernest F. Ganahl

Minutes of the last regular meeting were read and approved.

Loans from No. 6008 to 6112 were read and on motion by S. James Tuffree, seconded by J. W. Brunworth, were approved.

(Testimony of William A. Dolan)

On motion by S. James Tuffree, seconded by L. J. Kelly, expense items for the month ending with the date of this meeting, were approved.

It was moved by Ben Baxter, seconded by F. H. Dolan, and carried that a committee be selected to collect $175.00 per share from stockholders, to be used to purchase depreciation in bond account. A total of 577 shares were presented by directors present, all of whom agreed to pay at the above rate.

The President appoints a new bond committee, consisting of:

S. James Tuffree
Ernest F. Ganahl
Ben Baxter
Wm. A. Dolan

Rose L. Phegley
Secretary

Wm. A. Dolan
President"

Plaintiffs' Exhibit 2

"Minute Record Meeting held on the 17 day of July, 1931.

The regular monthly meeting on the Board of Directors of the Anaheim First National Bank, a national banking association, was held on the above date, President Wm. A. Dolan, presiding:

Wm. A. Dolan	L. J. Kelly
Ed. Kelly	J. H. Brunworth
Frank Baum	F. G. Fimpau
S. James Tuffree	

Minutes of the last regular meeting was read and approved, as were likewise the minutes of the special meeting of June 30, 1931.

(Testimony of William A. Dolan)

Loans from No. 6113 to 6199 were read and on motion by S. James Tuffree, seconded by L. J. Kelly, were approved.

The following resolution was offered by S. James Tuffree, seconded by J. M. Brunworth, and carried:

Resolved that the $115,650 which has been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, and the $25,000 now held on books of the bank in reserve account, be applied as follows:

Take up five notes of $6,000.00 each formerly placed in bank's assets by certain stockholders on account of bond depreciation.

The balance of said amount to be applied directly against the bond account of this bank on account of estimated depreciation, which will reduce the present total of bond account by $110,650. Be it further resolved that as further payments be received from stockholders on account of purchase of bond depreciation, that such sums shall be applied on bond account as above specified.

Adjournment,

Ross L. Phegley
Secretary

Wm. A. Dolan
President"

Plaintiffs' Exhibit 4

"In compliance with action of the Board of Directors taken at a meeting held June 18, 1931, recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned, the undersigned hereby subscribe to such fund in the amount set opposite our names.

(Testimony of William A. Dolan)

It is the intention that interest received from bonds equalling the amount of depreciation purchased be set aside for the use of the undersigned. An appraisal of the bond lease shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro rata among the stockholders purchasing depreciation of bond account.

Wm. A. Dolan	Pd.	$32,500	
F. A. Dolan	Pd.	32,500	
Ben Baxter 6-4-31	Pd.	1,750	
8500 P. E.			Date of Note
L. J. Kelly	Pd.	4,900	N. 10/10/32
Ernest F. Ganahl	Pd.	1,750	N. 10/ 7/32
Frank Baum	Pd.	5,250	N. 9/19/32
J. H. Brunworth		5,250	N. 10/ 6/32
		N 3 M	
S. James Tuffree	Pd.	3,500	9/29/32
Ed. Kelly		9,000	N. 10/ 7/32
Fred & Sophia Rimpau	Pd.	3,675	
F. A. Yungbluth		1,750	N. 11/32/32
J. K. Day	Pd.	875	N. 10/ 8/32
	Pd. 875-3000		
Minnie Baxter	Pd.	3,875	7/ 8/32
M. Del Giorgio	Pd.	875	N. 12/14/32
		Pd. 2,000	
Jennie Pomeroy	Pd.	3,500	7/11/32
		1,500	
D. A. Woodward (M B)		1,225	N. 11/22/32
J. W. Truxaw 10-28-32 N		1,750	
J. J. Dwyer		1,750	Pd."

(Testimony of William A. Dolan)
showed the value of the bonds listed in Defendant's Exhibit H at the time they were taken over by the Receiver and the prices obtained for those sold by the Receiver. That such bonds have all been sold [H I D]
~~That the receiver, J. V. Hogan, had sold almost all of the bonds wherein the depreciation was purchased by the directors and stockholders of the Anaheim First National Bank.~~ On Page 155, lines 16½ to Line 21½, inclusive, of the Reporter's Transcript of Testimony and Proceedings on Trial, we quote an objection which was overruled by the Court and exception noted, as follows:

"MR. MONTGOMERY: I object to that question as immaterial and irrelevant and indefinite, because an appreciation might exist in the market value of the bonds which is not reflected in what the receiver got for them. If I understand the account correctly, he is asking for the appreciation that the receiver got or that the bank got in making the sale. (Reporter's Transcript of Testimony and Proceedings on Trial, Page 155, Lines 16½ to 21½ inclusive.)

THE COURT: I will let him state it and exception noted. (Reporter's Transcript of Testimony and Proceedings on Trial, Page 156, line 1.)

———...———

EXCEPTION No. 11

Again on Page 156, Lines 24½ and 25½ and Page 157, Lines 1 to 3½ of Reporter's Transcript of Testimony and Proceedings on Trial, we find:

"Q $655.62. Have you also a total of the depreciations, the aggregate of depreciations on sales? (Reporter's Transcript of Testimony and Proceedings on Trial, Lines 24½ and 25½, at Page 156.)

(Testimony of W. J. Waldron)

MR. MONTGOMERY: Well, I would object to that on the ground it is immaterial, irrelevant and incompetent.

THE COURT: I will allow him to state and exception shown." (Reporter's Transcript of Testimony and Proceedings on Trial, Page 157, Lines 1 to 3½, inclusive.)

———...———

IV

W. J. WALDRON,

a witness on behalf of defendant, testified in part as follows:

That he was the national bank examiner in the territory in which the Anaheim First National Bank was situated from late fall of 1930 until the present time. It was further the testimony of the said W. J. Waldron that the which Dolan told him was [H I D] method for the purchase of bond depreciation ∧ suggested to the directors of the Anaheim First National Bank by R. Foster Lamm, Mr. Waldron's predecessor, had been discussed with the witness by W. A. Dolan and Ben Baxter about the month of June, 1931. We quote from lines 15 to 26, inclusive on Page 169, and Lines 1 to 3½, inclusive on Page 170, of Reporter's Transcript of Testimony and Proceedings on Trial, as follows:

"Q Now, when did you first have a discussion with him on that subject, as nearly as you can fix it?

A Well, though I don't particularly recall it, I think there must have been some discussion in my prior examination because a program had been originated prior to

(Testimony of Roy De La Mare)

that examination along that line, and my report of December, 1930, reflected the program that had been put into effect at a prior date.

Q The program already put into effect?

A Already put into effect.

Q And what program was that?

A That was the raising of some $30,000 in the spring or summer of 1930, represented by notes put in the bank's files.

Q And that was to repair impaired capital?

A Yes."

V

That

ROY De LA MARE,

a witness for defendant, also testified in part, as follows:

"* * * did the bank ever keep a record and an accounting of the depreciated bonds, or any group of depreciated bonds after June 24, 1931?

MR. MONTGOMERY: I object to that as immaterial.

THE COURT: He may state what the records show.

Q BY MR. DOCKWEILER: What do the records show, if you have knowledge of the records?

(Testimony of Roy De La Mare)

A There is no record that we have found in the bank —that I have found in the records of the bank that would so indicate that there was any segregation made by anyone. The bond account was kept just the same before June 24, 1931, as it was afterwards.

Q Were any lists made each six months or at other stated periods thereafter?

A I found no record to that effect.

MR. MONTGOMERY: I object to that as immaterial.

Q BY MR. DOCKWEILER: Now, was there any liability set up in the bank records—pardon me, I should not ask another question until there is a ruling on this.

THE COURT: He has answered. Let it remain.

MR. DOCKWEILER: I would say, your Honor, in defense of the question that it is predicated upon language

———...———

EXCEPTION No 10

ROY De LA MARE,

who kept the records of the Receiver of said Bank, J. V. HOGAN, testified in part as follows:

That the books of the Anaheim First National Bank used in this June 24th arrangement.

MR. MONTGOMERY: I may say in support of my objection that if the bank violated its agreement that does not relieve the receiver or the bank of responsibility.

(Testimony of Roy De La Mare)

THE COURT: Let it stand and exception shown. It has been answered." (Lines 9 to 26 inclusive on Page 175 and Lines 1 to 10, inclusive, on Page 176, of Reporter's Transcript of Testimony and Proceedings on Trial.)

It was further testified by this witness that plaintiffs' Exhibit IV, which shows was in the files of the bank when the sole management of said bank was taken over by the Receiver, Mr. J. V. Hogan.

VI.

That defendant's Exhibit H is as follows:

VII

That Minnie Palmer, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY and F. A. YUNGBLUTH were stockholders and not directors of said bank and that they at no time attended any of the meetings of said bank.

VIII

On August 11, 1938, the Court signed an order extending time within which to serve and file Bill of Exceptions and Extending term as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,	NO. 7522-J (In Law) ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM.
Plaintiffs and Appellants,	
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, JOHN DOE ONE, JOHN DOE TWO, and JOHN DOE THREE,	
Defendants and Appellees.	

On motion of EDW. C. PURPUS, attorney for plaintiffs herein except Frank Baum and Josephine Baum, husband and wife, and Ernest F. Ganahl, and good cause appearing therefor:

IT IS ORDERED that the time within which the plaintiffs herein may serve and file their Proposed Bill of Exceptions is hereby extended to and including August 31, 1938.

IT IS FURTHER ORDERED that for the purpose of making and filing the Bill of Exceptions herein and having same settled and allowed and the making of any and all Motions necessary to be made within the term in which the Motion for New Trial herein was denied, the term of this Court is hereby extended to and including August, 31, 1938.

Dated August 11, 1938.

WM. P. JAMES
United States District Judge

On August 16, 1938, the Court signed an order Enlarging Time within which Plaintiffs may file the Record and Docket the Cause in the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

"IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,	
Plaintiffs and Appellants,	NO. 7522-J (In Law)
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, JOHN DOE ONE, JOHN DOE TWO, and JOHN DOE THREE,	
Defendants and Appellees.	

ORDER ENLARGING TIME WITHIN WHICH PLAINTIFFS MAY FILE THE RECORD AND DOCKET THE CAUSE IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Good cause being shown therefor, IT IS ORDERED that the time of the plaintiffs to file the Record and Docket

cause in the United States Circuit Court of Appeals, in and for the Ninth Circuit, at San Francisco, California, may be extended to and including the 30th day of September, 1938.

Dated August 16, 1938.

WM. P. JAMES
United States District Judge"

On August 22, 1938, the Court signed an Order Enlarging Time within which to obtain Reporter's Transcript and serve and file additions to and changes in said Proposed Bill of Exceptions, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,	NO. 7522-J
Plaintiffs and Appellants.	(In Law) STIPULATION AND ORDER
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, et al.,	
Defendants and Appellees.	

WHEREAS, a Reporter's Transcript of all the evidence taken at the trial is advisable for the preparation of a proper Bill of Exceptions on appeal herein; and

WHEREAS, appellants desire to obtain such a transcript of the evidence and to submit changes in the Pro-

posed Bill of Exceptions heretofore filed herein on the 13th day of August, 1938; and

WHEREAS, some delay will unavoidable be encountered in obtaining said transcript and submitting said changes;

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, as follows:

That appellants shall have additional time, to and including the 6th day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions heretofore filed herein, and that appellee shall have additional time to and including the 16th day of September, 1938, within which to serve and file amendments to Appellants' said Proposed Bill of Exceptions and any additions to or changes therein; and

That the term of Court, expiring the 31st day of August, 1938, under order heretofore obtain herein, may be extended to and including the 29th day of September, 1938.

Dated this 22nd day of August, 1938.

EDW. C. PURPUS

By Edw. C. Purpus

Attorney for Appellants

DOCKWEILER & DOCKWEILER and BENJAMIN CHIPKIN,

By Henry I. Dockweiler

Attorneys for Appellee

ORDER

Upon reading the above stipulation and good cause appearing therefor, it is hereby ordered that appellants shall have additional time, to and including the 6th day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions *heretofor* filed herein, and that appellee shall have additional time to and including the 16th day of September, 1938, within which to serve and file amendments to appellants' said Proposed Bill of Exceptions and any additions to or changes therein; and

It is further ORDERED that the term of Court, expiring the 31st day of August, 1938, under order heretofore obtained herein, shall be and it is hereby extended to and including the 29th day of September, 1938.

WM. P. JAMES
United States District Judge"

On September 2nd, 1938, the Court signed an Order Enlarging Time within which to obtain Reporter's Transcript and serve and file additions to and changes in said Proposed Bill of Exceptions and extending the term of court to the 29th day of October, 1938, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,	
Plaintiffs and Appellants,	NO. 7522-J (In Law) STIPULATION AND ORDER
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, et al.,	
Defendants and Appellees.	

WHEREAS, a Reporter's Transcript of all the evidence taken at the trial is advisable for the preparation of a proper Bill of Exceptions on Appeal herein; and

WHEREAS, appellants desire to obtain such a transcript of the evidence and to submit changes in the Pro-

posed Bill of Exceptions heretofore filed herein on the 13th day of August, 1938; and

WHEREAS, some delay will unavoidably be encountered in obtaining said transcript and submitting said changes;

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, as follows:

That appellants shall have additional time, to and including the 13th day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions heretofore filed herein, and that appellee shall have additional time to and including the 23rd day of September, 1938, within which to serve and file amendments to appellants' said Proposed Bill of Exceptions and any additions to or changes therein; and

That the term of Court, expiring the 29th day of September, 1938, under order heretofore obtained herein, may be extended to and including the 29th day of October, 1938.

Dated this 2nd day of September, 1938.

EDW. C. PURPUS

By .....

Attorney for Appellants

DOCKWEILER & DOCKWEILER and
BENJAMIN CHIPKIN,

By .....

Attorney for appellee"

ORDER

Upon reading the above stipulation and good cause appearing therefor, it is hereby ORDERED that appellants shall have additional time, to and including the 13th day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions heretofore filed herein, and that appellee shall have additional time to and including the 23rd day of September, 1938, within which to serve and file amendments to appellants' said Proposed Bill of Exceptions and any additions to or changes therein; and

It is further ORDERED that the term of Court, expiring the 29th day of September, 1938, under order heretofore obtained herein, shall be and it is hereby extended to and including the 29th day of October, 1938, and it is further ORDERED that the date of the appellants to file the record and docket cause in the United States Circuit Court of Appeals in and for the Ninth Circuit at San Francisco, California, may be extended to and including the 29th day of October, 1938.

WM. P. JAMES
United States District Judge for
the Southern District of California"

On September 8th, 1938, the Court signed an order Enlarging Time within which to obtain Reporter's Transcript and serve and file additions to and changes in said Proposed Bill of Exceptions, as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,	NO. 7522-J
Plaintiffs and Appellants,	(In Law) STIPULATION AND ORDER
vs.	
ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, et al.,	
Defendants and Appellees.	

WHEREAS, a Reporter's Transcript of all the evidence taken at the trial is advisable for the preparation of a proper Bill of Exceptions on appeal herein; and

WHEREAS, appellants desire to obtain such a transcript of the evidence and to submit changes in the Proposed Bill of Exceptions heretofore filed herein on the 13th day of August, 1938; and

WHEREAS, some delay will unavoidably be encountered in obtaining said transcript and submitting said changes;

NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, as follows:

That appellants shall have additional time, to and including the 23rd day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions heretofore filed herein, and that Appellee shall have additional time to and including the 3rd day of October, 1938, within which to serve and file amendments to appellants' said Proposed Bill of Exceptions and any additions to or changes therein;

Dated: This 8th day of September, 1938.

EDW. C. PURPUS

By Edw. C. Purpus

Attorney for Appellants

DOCKWEILER & DOCKWEILER and BENJAMIN CHIPKIN,

By Henry I. Dockweiler

Attorneys for Appellee

ORDER

Upon reading the above stipulation and good cause appearing therefor, it is hereby ORDERED that appellants shall have additional time, to and including the 23rd day of September, 1938, within which to obtain said transcript and serve and file additions to and changes in said Proposed Bill of Exceptions heretofore filed herein, and that appellee shall have additional time to and including the 3rd day of October, 1938, within which to serve and file amendments to appellants' said Proposed Bill of Exceptions and any additions to or changes therein.

WM. P. JAMES
United States District Judge for
the Southern District of California"

Inasmuch as the rulings and exceptions specified in the foregoing Bill of Exceptions do not appear in the record of the said cause, and are correct in all respects, I, Wm. P. James, Judge of the said Court, who presided at the trial thereof, after due notice given to the plaintiffs herein have settled and signed the said Bill and have ordered the same to be made a part of the record on the 14 day of October, 1938, being within the judgment term as extended by Order of this Court, and shall be used by the parties, plaintiffs or defendants, upon any Appeal taken by either parties, plaintiffs or defendants, in the above-entitled case.

Wm P James
United States District Judge

ACKNOWLEDGMENT OF SERVICE

The undersigned, as attorneys for defendant and appellee ANAHEIM FIRST NATIONAL BANK, a national banking association, hereby admit service on them of the following document in the above-captioned case:

Proposed Bill of Exceptions.

Dated this 13th day of October, 1938.

DOCKWEILER & DOCKWEILER and
BENJAMIN CHIPKIN,

By Henry I. Dockweiler

Attorneys for defendant and appellee

Approved as to form but not as to content, under Rule 44. Dockweiler & Dockweiler, & Benj. Chipkin by Henry I. Dockweiler

[Endorsed]: Filed Oct 14 1938 R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife, Plaintiffs and Appellants, vs. ANAHEIM FIRST NATIONAL BANK, a National Banking Association, et al, Defendants and Appellees.	NO. 7522-J (In Law) PETITION FOR APPEAL

Plaintiffs herein, except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been dismissed so far as the same affects and relates to them, considering themselves aggrieved by that certain Minute Order in these proceedings made on the 10th day of January, 1938, wherein and whereby Judgment was rendered in favor of the defendants and against the plaintiffs herein, and that certain Minute Order made in these proceedings on the 13th day of May, 1938, wherein and whereby Plaintiffs' Motion for a New Trial of this matter

was denied, DOES HEREBY APPEAL from such Orders and Judgment, and each of them, to the United States Circuit Court of Appeals of the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed simultaneously herewith, and pray that this Appeal may be allowed; that a citation be issued direct to the defendants, commanding them to appear before the said United States Circuit Court of Appeals of the Ninth Circuit, doing and receiving what may appertain to justice to be done in the premises; and that a Transcript of the Records, Papers, Proceedings, Arguments, Orders, Judgment and Decrees, including the Judgment Roll upon which the aforesaid Orders and Judgments, and each of them, are based, duly authenticated. may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 25 day of July, 1938.

EDW. C. PURPUS

By Edw. C. Purpus

Attorney for Plaintiffs and Appellants.

ORDER ALLOWING APPEAL

The foregoing Appeal is hereby allowed this 25 day of July, 1938; plaintiffs, the Petitioners herein to file cost bond in the sum of TWO HUNDRED AND FIFTY DOLLARS ($250.00).

Wm. P. James,

United States District Judge

[Endorsed]: Filed Jul 25 1938 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.

[Title of District Court and Cause.]

NO. 7522-J
(In Law)

ASSIGNMENT OF ERRORS

NOW COMES, L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUSH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY and ERNEST F. GANAHL, plaintiffs and appellants herein, and file this, their Assignment of Errors, complaining that the honorable trial court in determining and ordering that Findings and Judgment be entered in favor of the defendants and against the plaintiffs erred as follows:

I

That the Minute Order of the Court determining and ordering that Findings and Judgment be entered in favor of the defendants, was not in accordance with the law and the facts of the case.

II

That the Minute Order of the Court denying the plaintiffs' Motion for New Trial was not in accordance with the law.

III

That the Court erred in Finding No. IV that the plaintiffs F. K. DAY and all of said plaintiffs except M. E. DAY and JOSEPHINE BAUM, together with other shareholders of said bank, or any of them, did not enter into an Agreement with said bank whereby the said other

shareholders of said bank and said F. K. DAY and all of the plaintiffs, except M. E. DAY and JOSEPHINE BAUM, or any of them, agreed to purchase from said bank said depreciation then existing in said bond account; and that it was not true that by the terms of any such agreement said bank agreed to pay from time to time to the aforesaid parties, or to any of them, any pro-rata decrease which might from time to time appear in said depreciation of said bond account; that said Finding No. IV is contrary to the evidence both oral and documentary, and is not in accordance with the law.

IV

That the Court erred in Finding No. V that it is not true that in any such agreement, as set forth in said complaint, or otherwise, the following persons respectively agreed to pay to said Bank the following, or any other, sums:

L. J. Kelly	$ 4,900.00
F. H. Dolan	32,500.00
Ben Baxter	1,750.00
S. James Tuffree	3,500.00
Ed. Kelly	9,000.00
F. A. Yungbluth	1,700.00
Minnie Palmer (formerly known as Minnie Baxter)	3,850.00
M. Del Giorgio	875.00
Jennie Pomeroy	3,500.00
J. W. Truxaw	1,750.00
J. J. Dwyer	1,750.00
F. K. Day	875.00
Ernest F. Ganahl	1,750.00 and
Frank Baum	5,250.00;

and it is not true that pursuant to such agreement said persons, excepting Ernest F. Ganahl and Frank Baum, on or about July 17, 1931, paid to said Bank the sums hereinabove set opposite their respective names and it is not true that pursuant to any such agreement said Ernest F. Ganahl on or about July 17, 1931 executed his promissory note for $1,750.00 to said Bank or that, pursuant to such agreement he made any payments of principal or interest on such a note; and it is not true that pursuant to any such agreement said Frank Baum executed his promissory note dated December 19, 1932, for $5,250.00 to said Bank or that pursuant to such agreement be paid interest on said note, or that, pursuant to such agreement, plaintiffs Frank Baum and Josephine Baum on or about May 9, 1933 executed and delivered to said Bank a certain trust deed on the property described in the fourteenth count of the complaint on file herein; that the Court erred in Finding No. V that it is true that said payments were made and said notes and trust deed were executed and delivered by said persons as voluntary contributions to said Bank and said Bank was not and is not obligated under any such agreement or otherwise to repay said sums or any part thereof, and said Bank has not repaid the same or any part thereof; that said Finding is contrary to the evidence both oral and documentary and is not in accordance with the law.

V

That the Court erred in Finding No. VIII that it is not true that by reason of the appointment of said receiver and the liquidation of the assets of said Bank, including said bond account, or otherwise, there has been any failure of consideration, wholly or partially, for the respective payments hereinabove set forth as having been

made by said persons to said Bank; and it is not true that by reason of any matters or things set forth in plaintiffs' complaint said Bank has become and is now, or ever was, indebted to any of said persons above named or to any of the plaintiffs herein for or on account of any sums of money whatsoever, either as principal or interest, that said Finding is not in accordance with the law and is contrary to the evidence and facts of the case.

VI

That the Court erred in Finding No. X that it is true that none of said claims was a valid or proper claim against said Bank or in the matter of the receivership of said Bank; that said Finding is not in accordance with the law, nor with the evidence or facts of the case.

VII

That the Court erred in Finding No. XI that it is not true that within two years prior to the preparation of the complaint, on file herein, or within two years prior to the filing thereof, the persons hereinabove in Finding No. V named loaned respectively to said Bank the sums respectively set after their names in said Finding No. V; and it is not true that said Bank received said respective sums, or any of said sums or any part thereof, for the use and benefit, or use or benefit, respectively of said persons, or any of said persons, whose names are set forth in said Finding No. V; and it is not true that said Bank promised to repay said sums on demand or otherwise; and the Court further erred in Finding No. XI that it is also true that said Bank is in no way obligated, in the matter of said receivership or otherwise, to repay said sums or any part thereof to said persons or to any persons or person whomsoever; that

said Finding is not in accordance with the evidence both oral and documentary and is not in accordance with the law.

VIII

That the Court erred in Finding No. XII that it is also true on various occasions and at various times between July 1930 and November 1931 said Comptroller of the Currency, through his duly authorized deputy comptrollers, notified and instructed said Bank, and the officers and directors thereof, that payments made to repair the impaired capital of said Bank must be considered as voluntary and unconditional contributions, without obligation of repayment, that each and all of said persons who made said payments hereinabove referred to acquiesced by lapse of time and otherwise in said notification and instruction of said Comptroller of the Currency; that said payments were payments made to repair the impaired capital of said Bank and were, each and all, voluntary and unconditional contributions, without any obligation whatsoever on the part of said Bank to repay same; that the law requires all payments such as those made by plaintiffs under the circumstances shown by the evidence herein to be voluntary and unconditional and without any obligation whatsoever on the part of the bank to repay same, as to the plaintiffs, MINNIE PALMER, formerly known as MINNIE BAXTER, JENNIE POMEROY, M. DEL GIORGIO and F. A. YUNGBLUTH, and as to those plaintiffs is contrary to the undisputed evidence; that to each and all of the plaintiffs, except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been dismissed so far as the same affects

and relates to them, said Finding has no application in law by reason of the fact that the said correspondence therein referred to all took place after the said contract had been consummated, and said Finding is not in accordance with the law.

IX

That the Court erred in Finding No. XIII that it is true that no evidence has been presented to this court proving any appreciation in the value of the bonds in said bond account, the depreciation in which bond account is alleged by plaintiffs to have been purchased by plaintiffs or, in the case of plaintiffs M. E. DAY, her predecessor in interest F. K. DAY; and that no evidence has been presented to this court of any legal damage or loss suffered or sustained by plaintiffs or any of them, which is not in accordance with the law or the facts of the case and is contrary to the evidence both oral and documentary.

X

That the Court erred in Paragraph I of his Conclusions of Law in finding that there did not exist any contract between said Bank and the persons who made the payments to said Bank hereinabove set forth whereunder and whereby said Bank was obligated to repay said sums or any part thereof; that said payments were voluntary and unconditional contributions to said Bank, and were such because of the requirement of the law in that respect and because of the acquiescence by said persons for a long period of time in the notification and instruction given by the Comptroller of the Currency that such con-

tributions must when made be considered as voluntary and unconditional contributions without obligation on the part of the Bank to repay same; that said finding is not in accordance with the law or the facts of the case and is against the evidence both oral and documentary.

XI

That the Court erred in Paragraph II of Conclusions of Law in finding that none of the plaintiffs herein is entitled to recover any sum so paid to said Bank or any promissory note given to said Bank to cover his contribution, as hereinabove set forth, either under causes of action numbers I to XIV, inclusive, or under causes of action numbers XV to XXVIII, inclusive, of plaintiffs' complaint on file herein; that said Finding is contrary to the evidence and not in accordance with the law.

XII

That the Court erred in Paragraph III of his Conclusions of Law in finding that defendant Anaheim First National Bank, a national banking association, is entitled to judgment herein, together with its costs of suit; that said finding is not in accordance with the law.

Dated this 25th day of July, 1938.

EDW. C. PURPUS

By Edw. C. Purpus

Attorney for plaintiffs and appellants.

[Endorsed]: Filed Jul. 25 1938 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J
(In Law)

ORDER ALLOWING APPEAL

The plaintiffs above-named except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by order made and entered herein June 5, 1937, been fismissed so far as the same affects and relates to them, and appellants herein, having filed a Petition for an Order Allowing their Appeal from that certain Minute Order in these proceedings made on the 10th day of January, 1938, wherein and whereby Judgment was rendered in favor of the defendants and against the plaintiffs herein and that certain Minute Order made in these proceedings on the 13th day of May, 1938, wherein and whereby plaintiffs' Motion for New Trial of this matter was denied, which said Petition was accompanied by an Assignment of Errors;

NOW THEREFORE on Motion of counsel for said plaintiffs, it is hereby

ORDERED that said Petition for Order Allowing an Appeal be and the same is hereby granted and said appeal to the United States Circuit Court of Appeals for the Ninth Circuit allowed, and it is further

ORDERED that plaintiffs' cost bond upon Appeal be, and the same is hereby fixed in the sum of TWO HUNDRED FIFTY DOLLARS ($250.00), and it is further

ORDERED that a certified copy of the Transcript of the record and proceedings herein pertinent to this appeal be forthwith transmitted to the Clerk of the United States Circuit Court of Appeals for the ninth Circuit at San Francisco.

Dated: July 25, 1938.

Wm. P. James
United States District Judge

[Endorsed]: Filed Jul 25, 1938 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

NO. 7522-J
(In Law)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit depending in said Court between L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY, plaintiffs and THE ANAHEIM FIRST NATIONAL BANK, a National Banking Association, et al., defendants, No. 7522-J (In Law) of said Court, a judgment was rendered against L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, and M. E. DAY, and

WHEREAS, the said L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, and M. E. DAY, plaintiffs have obtained from the United

States District Court an order for an appeal to reverse the judgment in the aforesaid suit and a citation directed to said ANAHEIM FIRST NATIONAL BANK, a National Banking Association, JOHN DOE COMPANY, a corporation, JOHN DOE ONE, JOHN DOE TWO, AND JOHN DOE THREE, J. V. HOGAN, Receiver, Intervenor, defendants, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California within thirty days from the date of said citation, to-wit, July 26, 1938:

NOW THEREFORE, there is deposited with you as Clerk of said United States District Court as aforesaid, the sum of Two Hundred Fifty Dollars ($250.00) cash bond on appeal, that the said L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY shall prosecute its appeal to effect and answer all costs if it fail to make their appeal good; otherwise the said sum to be returned to EDW. C. PURPUS, their attorney, if said L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY, filing their appeal herein, upon the filing of the Mandate of the Circuit Court of

Appeals in favor of said L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUSH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY on their appeal or that no costs be recovered against it.

F. H. DOLAN, Appellant,
By EDW. C. PURPUS
Edw. C. Purpus
His Attorney

APPROVED:

July 26, 1938.
Wm P. James
United States District Judge

[Endorsed]: Filed Jul. 26, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J
(at law)

ACKNOWLEDGMENT OF SERVICE

The undersigned, as attorneys for defendants and appellee Anaheim First National Bank hereby admit service on them of the following documents in the above-captioned case:

Assignment of Errors
Petition for Appeal
Citation
Order Allowing Appeal

Dated this 4th day of August, 1938.

DOCKWEILER & DOCKWEILER AND
BENJAMIN CHIPKIN

By Henry I. Dockweiler

Attorneys for Appellee
Anaheim First National Bank

[Endorsed]: Filed Aug 4 1938 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk

[Title of District Court and Cause.]

NO. 7522-J

(In Law)

STIPULATION

WHEREAS, the record shows that an Appeal has been filed on behalf of ERNEST F. GANAHL, and it appearing further that said ERNEST F. GANAHL now refuses to go forward with said Appeal and refuses to file necessary bond, IT IS STIPULATED by counsel that a severance may be granted as to ERNEST F. GANAHL, and his Appeal may be dismissed as to him only and that L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY are to appear only as appellants, and shall go forward with said Appeal. That in all other respects the Order Allowing Appeal of the District Court of the United States and the Appeal shall be continued in full force and effect.

DOCKWEILER & DOCKWEILER and
BENJAMIN CHIPKIN,
By Henry I. Dockweiler
Attorneys for Appellees

WM. J. M. HEINZ
By Wm. J. M. Heinz
Attorney for appellant, Ernest F. Ganahl.

EDW. C. PURPUS
By Edw. C. Purpus
Attorney for appellants

[Endorsed]: Filed Aug. 13, 1938 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J

ORDER GRANTING SEVERANCE OF ERNEST F. GANAHL TO APPEAL

IT IS SO ORDERED and the severance is hereby granted, the Appeal is dismissed as to ERNEST F. GANAHL and continued for hearing and for decision as to the plaintiffs and appellants, L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY.

Dated: This 13 day of August, 1938.

Wm. P. James
United States District Judge

[Endorsed]: Filed Aug. 13, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

NO. 7522-J
(In Law)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties to the above-entitled action, that the transcript on appeal heretofore taken by plaintiffs from decree herein need not repeat the title of the cause in any other paper included in the transcript than the Bill of Complaint, and that there may be likewise omitted from the transcript all endorsements on the backs or covers of such papers, provided that the endorsement as to filing date in each instance appear and be printed. This stipulation is entered into to save expense and encumbrance of the record, and shall be made a part of the record herein.

Dated: August 12, 1938.

EDW. C. PURPUS
By Edw. C. Purpus
Attorney for Appellants.

DOCKWEILER & DOCKWEILER and BENJAMIN*E* CHIPKIN
By Henry I. Dockweiler
Attorneys for Appellee.

[Endorsed]: Filed Aug 13, 1938 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk

[Title of District Court and Cause.]

No. 7522-J

ORDER

Upon application of the plaintiffs and appellants herein, it is hereby ORDERED that the plaintiffs and appellants in the above-entitled action may and shall proceed under the rules of Civil Procedure applicable to the District Courts, Ninth Circuit Court of Appeals and to the Supreme Court of the United States in force prior to September 16th, 1938, under and by authority of Rule 86 of Civil Procedure applicable to the Ninth Circuit Court of Appeals and to the Supreme Court of the United States, by reason of the fact that the new rules of Civil Procedure would not be feasible to work justice in this action.

Wm. P. James
United States District Judge

Dated October 21, 1938

[Endorsed]: Filed Oct 22 1938 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

NO. 7522-J
(In Law)

PRAECIPE FOR TRANSCRIPT OF RECORD

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

Please issue a certified transcript of record in the above-entitled case, consisting of the following:

1. Complaint.
2. Petition for Removal from Superior Court of Orange County.
3. Notice to Plaintiff of Removal from Orange County Superior Court.
4. Bond for Removal.
5. Order for Removal.
6. Notice of Motion of Plaintiffs to Remand.
7. Motion of Plaintiffs to Remand.
8. Order Denying Motion of Plaintiffs' to Remand.
9. Notice of Denial of Motion to Remand.
10. Answer of Defendant, Anaheim First National Bank.
11. Dismissal as to Frank Baum and Josephine Baum, husband and wife, as parties plaintiff.
12. Stipulation signed by plaintiffs' counsel Waiving Jury.
13. Order for Findings and Entry of Findings and Judgment.
14. Findings and Judgment.
15. Objections of Plaintiffs to Findings.
16. Order of March 2, 1938 Overruling Objections of Findings and Denying Plaintiffs Exceptions to Findings.

17. Notice of Hearing Motion and Motion of Plaintiffs for New Trial.

18. Order Denying Motion of Plaintiffs for New Trial.

19. Petition of Plaintiffs (Except Frank Baum and Josephine Baum) for Appeal and Order Thereon.

20. Order Allowing Appeal.

21. Assignment of Errors.

22. Citation signed by Judge James.

23. Cash Bond on Appeal.

24. Acknowledgment of Service of Appeal Papers.

25. Stipulation re Severance of Ernest F. Ganahl to Appeal.

26. Order Granting Severance of Ernest F. Ganahl to Appeal.

27. Stipulation re Omitting Title of Cause.

28. Praecipe.

29. Engrossed Bill of Exceptions.

EDW. C. PURPUS
By Edw. C. Purpus
Attorney for plaintiffs except
Frank Baum, Josephine Baum
and Ernest F. Ganahl.

Receipt of a copy of the above Praecipe for Transcript of Record is hereby acknowledged.

Dated: October 17th, 1938.

DOCKWEILER & DOCKWEILER and
Benjamin CHIPKIN
By Henry I. Dockweiler
Attorneys for defendant.

[Endorsed]: Filed Oct. 17, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

No. 7522-J

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Please prepare and print sixty (60) copies of the Transcript of Record on Appeal in the above-entitled action in place and stead of forty (40) copies of the Transcript of Record on Appeal in the above-entitled action as requested on the 17th day of October, 1938.

EDW. C. PURPUS

By Edw. C. Purpus

Attorney for Plaintiffs and Appellants.

[Endorsed]: Filed Oct 20 1938 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 165 pages, numbered from 1 to 165 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; petition for removal; notice of petition for removal; bond on removal; order for removal; notice of motion to remand; motion to remand; order of May 12, 1936; notice of denial of motion to remand; answer; order re withdrawal of Mark Baum and Josephine Baum as parties plaintiff; waiver of jury trial; order of January 12, 1938; order of March 2, 1938; findings of fact and conclusions of law; judgment; bill of exceptions; petition for appeal; assignment of errors; order allowing appeal; bond on appeal; stipulation re severance of Ernest F. Ganahl to appeal; order granting severance of Ernest F. Ganahl to appeal; stipulation re omitting "Title of Court and Cause"; order of October 21, 1938, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that

the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of October, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-third.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 9020

United States

Circuit Court of Appeals

For the Ninth Circuit.

L. F. KELLY, F. H. DOLAN, et al.,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association, and J. V. HOGAN, Receiver,

Appellees.

Supplemental Transcript of Record

(Reporter's Transcript and Exhibits)

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9020

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. KELLY, F. H. DOLAN, et al.,

Appellants,

vs.

NAHEIM FIRST NATIONAL BANK, a National Banking Association, and J. V. HOGAN, Receiver,

Appellees.

Supplemental Transcript of Record

(Reporter's Transcript and Exhibits)

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
For the Southern District of California
Central Division

Hon. William P. James, Judge Presiding
Law No. 7522-J

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, F. A. YUNGBLUTH, MINNIE PALMER (formerly known as Minnie Baxter), M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Plaintiffs,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking association, JOHN DOE COMPANY, a corporation, et al.,

Defendants.

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS ON TRIAL

Appearances:

Joseph Scott, Esq.,
Edward C. Purpus, Esq.,
Charles C. Montgomery, Esq.,
Charles C. Montgomery, Jr., Esq.,
A. H. Risse, Esq., and
William J. Heinz, Esq.,
For the Plaintiffs.
Dockweiler & Dockweiler, by
Henry I. Dockweiler, Esq., and
Benjamin Chipkin, Esq., and through
J. V. Hogan, Receiver of same,
For the Defendants.

Los Angeles, California,
Tuesday, July 20, 1937, 10:00 A. M.

The Court: Are you ready, gentlemen, in this matter against the Anaheim Bank?

Mr. Chipkin: We are, your Honor.

Mr. Scott: If your Honor please, in this matter I desire to make a motion for the substitution in place of myself as attorney for the several plaintiffs whom I represent. I desire to move the court to substitute in place of myself Charles C. Montgomery, Charles C. Montgomery, Jr., Edward C. Purpus, and A. H. Risse, who represents our office, if your Honor please, and myself. I will say that I understood there was to be a continuance of this

case by stipulation. Apparently counsel have not gotten together in that respect, and I have been somewhat handicapped because Mr. Hitchcock of my office was all ready to try this case originally on the date set for trial, and his vacation comes at this time so he is not available. So Mr. Risse will represent my office to a large extent. I will try and watch the proceedings as far as I may, but we are pretty short-handed.

Mr. Montgomery, Sr.: I think I owe your Honor an apology. I thought I had a stipulation arranged, but it subsequently developed that it was not arranged.

Mr. Chipkin: We would have agreed, but it was conditioned upon another case that the other side did not [2*] agree upon. It was pending for a number of years and has been adjudicated in another case. I do not think counsel stand taken at a disadvantage.

The Court: I will hear a statement from any counsel for any of the plaintiffs, to make clear just what you have here that is controverted and in dispute as questions of fact.

Mr. Montgomery: I desire now to file a waiver of jury trial.

The suit, your Honor, is to recover payments that were made by the stockholders of the Anaheim First National Bank, a National banking association, in

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1931, of $175 a share, the stockholders' liability being $100 a share. They made this not as a voluntary contribution but to purchase, as they described it, the deficiency in the bond account. It seemed that the bond account had depreciated in value to the extent that the bank examiner advised them that that deficiency would have to be made up and that they could buy an interest in the bond account.

The bank ran for a couple of years after that, then went into the hands of a conservator, who handled it for a period of one year, and then in 1934 the Receiver was appointed by the Comptroller of Currency, and at that time the Receiver took all the assets of the bank, including the bonds in which these parties had, as they supposed, purchased an interest, and the bonds have ever since been [3] held by him, with various changes made—various sales, I should say, until he has at the present time, I think something like about $20,000 of bonds on hand. But the Receiver did not hold these bonds for the benefit of, or as a separate account, or in any way arranged for these stockholders who put up their money so that they could get any excess out of the bonds.

The Court: Did the stockholders have to respond to any calls from the government Receiver?

Mr. Montgomery, Sr.: The Comptroller of Currency—I don't know as it appears in this suit—but the fact of the matter is that the Comptroller has levied an assessment on the stockholders, so that any

tockholder who paid his assessment would pay not nly the 100 cents on the dollar on the stockholders' liability, but he would have paid $275 by reason f these contributions.

Mr. Dockweiler: May it please the court, so far as——

Mr. Montgomery, Sr.: Pardon me, just a minute.

(Counsel conferring privately.)

Mr. Montgomery: Will you agree to this waiver?

Mr. Dockweiler: Surely. As far as the defendant bank is concerned, in open court we stipulate to the waiver of jury trial.

I do not think, your Honor, that it will be necessary for us at this juncture to make any extended statement touching the defense, except to say this: That the defense [4] is, briefly this: That any and all contributions made by these plaintiffs and any others who may have made them pursuant to any agreement among themselves, or purported agreement with the bank itself, were merely voluntary contributions to repair the impaired capital of the bank, and as such, under the rules and practice governing national banks and the administration of national banks all contributions must be considered as having been made voluntarily and without expectation of reimbursement; and that it is immaterial whether, having made these contributions and the bank having been thereby permitted by the Comptroller to continue on for a couple of years more than otherwise it would have, and it being

immaterial that thereafter a levy of assessment was made, the contributions were voluntary contributions made, and necessarily so, under the practice of the banking administration, without expectation of reimbursement. And that will appear, your Honor, clearly as we adduce the evidence for the defense.

The Court: What defenses are alleged?

Mr. Dockweiler: Well, I take it, your Honor—would you prefer to indicate them?

Mr. Montgomery: Yes. Paragraph I is admitted, that F. K. Day is dead, but it is denied that, for lack of information and belief, M. E. Day succeeded to all of the right, title and interest. So I think Day is out of it, anyway, so we do not need to consider that paragraph. [5]

Mr. Dockweiler: Do we understand that Day is out for the purposes of this case?

Mr. Montgomery: For the purposes of this case; yes.

Mr. Chipkin: Ben Baxter is out also. We had a case separately filed by Ben Baxter which was dismissed by the plaintiff.

Mr. Montgomery: He is not a party here, anyway—oh, pardon me. Yes; Ben Baxter is out and Day is out and Frank Baum and Josephine Baum are out, so paragraph II may be disregarded.

It is admitted that the defendant Anaheim First National Bank is a national banking association organized under the statutes of the United States

nown as the National Banking Act; and that said ank has its place of business in Anaheim, Orange County, State of California; that the said bank was leclared insolvent by the Comptroller of the Currency of the United States of America on the 15th lay of January, 1934, and that on that date the said Comptroller of the Currency appointed J. V. Hogan is Receiver of said bank, and that ever since the said time the said J. V. Hogan has been and now is acting in the performance of his duties as Receiver of said bank.

And then in paragraph IV it is admitted that on or about June 18, 1931, a depreciation existed in the bond account of said defendant Anaheim First National Bank; and that at said time the aforesaid F. K. Day and all of the plaintiffs [6] herein, except the plaintiffs M. E. Day and Josephine Baum, were stockholders in said bank. Then the balance of that paragraph is denied, and that is the allegation of the agreement to purchase the depreciation existing, etc.

Paragraph V is denied, that L. J. Kelly agreed to pay the sum of $4,900 under the purported agreement.

Paragraph VI is admitted, that on or about January 15, 1934——

(Counsel conferring together privately.)

Mr. Montgomery: My error. That is denied. Well, that is the fact, isn't it, that on or about January 15, 1934, the said J. V. Hogan——

Mr. Chipkin: That is correct. That should be admitted.

Paragraph VI should be admitted, your Honor.

Mr. Montgomery: —as Receiver of said bank, took possession of all the assets of the said bank, including the said bond account, and liquidated the same.

Mr. Chipkin: You might say we denied the liquidation, of course.

Mr. Montgomery: He has not completed the liquidation. The matter is still pending and he has some on hand.

Then VII is denied. VII sets out that there is a failure of consideration by reason of the fact that this bond account was not devoted to our interests.

VIII is admitted, that on or about May 31, 1934, said [7] Comptroller of the Currency published his notice requiring all persons having claims against the bank to present their claims to the said J. V. Hogan, as Receiver, as aforesaid, with the legal proof thereof within three months from the said May 31, 1934.

As to IX, it is admitted that there was a presentation of the claim and that it was not paid; but it is alleged that it was not a valid claim.

Then, of course, the next cause of action is for a different stockholder and there would be the same allegations and admissions and denials with regard to that, and so on through.

The Court: In referring to paragraph I you said Day was out of it, also Baxter was out of it. What did you mean by that?

Mr. Montgomery: I mean to say that Day has abandoned the litigation and we do not represent them, and Baxter——

Mr. Chipkin: Filed a separate suit.

Mr. Montgomery: There was a separate suit filed on a stockholder's liability, I think, and Baxter endeavored to counter-claim there on the contribution to the bank, and the whole matter so far as Baxter and one other stockholder was adjudicated in the other suit. That suit was tried before Judge McCormick and a jury.

Mr. Dockweiler: Then, Mr. Montgomery, with reference to the counts, starting with count 15 or 16, I think that [8] those counts were merely for the relief wanted, but in the alternative and referring to the same contributions or advancements, whichever we choose to call them.

Mr. Montgomery: Yes; the same thing. In other words, this same contribution is pleaded in count 15 as a loan to the bank, which is merely another way of saying that it was not a voluntary contribution but it was exepected to be repaid.

Mr. Dockweiler: And refers to the same matter.

Mr. Montgomery: And refers to the same contribution or same payment on that account.

I might, your Honor, at this time give you the two cases on which we rely. It sometimes is helpful to

have those in advance. One is Dudley v. Citizens State Bank of Santa Monica, 103 Cal. App. 433. I don't remember whether your Honor has a book-convenient, but if not, I can leave my volume right here.

The Court: I think I have it.

Mr. Dockweiler: That is to say, that is 103?

Mr. Montgomery: 103 Cal. App. 433. That holds that a contribution which is not a voluntary contribution is recoverable and there is an implied contract to repay it.

The Court: You say "not a voluntary contribution"?

Mr. Montgomery: Yes.

The Court: You claim that this was an involuntary contribution? [9]

Mr. Montgomery: Well, voluntary in the sense that the only consideration was the continuance of the bank. You see, our contention is that we thought we were buying something, as they express that, the depreciation in the bond account; and we contributed not only $100 a share, which would be equal to our stockholders' liability, but it was $175.

The other case is an early Northern District of Ohio case in the 42nd Federal, beginning at page 11 and the particular portion we refer to is on page 14

Mr. Dockweiler: May I note the name of that case?

Mr. Montgomery: Didn't I give that? Pardon me. Booth v. Welles.

Mr. Dockweiler: Thank you.

The Court: Substantially, then, you have only to introduce evidence as to the circumstances under which these contributions were made?

Mr. Montgomery: That is it.

Mr. Dockweiler: I think that is largely the problem, your Honor.

The Court: Yes.

Mr. Montgomery: I will call Mr. Tuffree. [10]

S. JAMES TUFFREE,

a plaintiff herein, called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. S. James Tuffree.

Direct Examination

Q. By Mr. Montgomery: What is your business or occupation, Mr. Tuffree?

A. Orange grower.

Q. Have you been in the banking business?

A. Yes.

Q. Where do you live? A. In Placentia.

Q. That is down in Orange County?

A. Yes, sir.

Q. How long have you lived there?

A. 45 years.

(Testimony of S. James Tuffree.)

Q. Were you one of the stockholders of the First National Bank of Anaheim? A. I was.

Q. And were you a director? A. I was.

Q. Did you make a payment into the bank in 1931 in connection with the bond account? **[11]**

A. I did.

Q. What was your contribution?

A. $175 a share.

Q. How many shares did you have?

A. $3,500—twenty.

Q. What is that? A. Twenty.

Q. You actually paid your money in?

A. Yes, sir.

Q. Who did you pay it to?

A. I paid it into the bank, I think the cashier, Mr. Phegley.

Q. Has any of that money been returned to you?

A. It has not.

Q. Have you received anything on account?

A. No, sir.

Q. Now, before you made the contribution was there some meeting of the board of directors?

A. There was.

Q. Were you present at that meeting?

A. I was.

Mr. Montgomery: May we request if you have those minutes? We might read those in.

Mr. Dockweiler: Yes. As a matter of fact, Mr. Montgomery, I have copies of the minutes and for

(Testimony of S. James Tuffree.)

convenience, if you prefer to introduce the copy, I will be very happy [12] to have that done.

Mr. Montgomery: May I have that, then?

Mr. Dockweiler: Which is the meeting that you first want? Or it might—well, yes; suppose that you indicate which meeting you have in mind, first.

Mr. Montgomery: Q. What was the meeting at which this matter was taken up, do you recall?

A. As I recall, Bank Examiner Lamm was present at this meeting.

Q. Do you remember the date of it?

A. No; I do not.

Mr. Montgomery: Now, if I may have just a second. There were two meetings and I forgot now which one it was.

Mr. Chipkin: I think the one you want is July 17, 1931.

Q. By Mr. Montgomery: Are you speaking of a meeting prior to the one where you made your contribution, where Mr. Lamm was present?

A. Yes, sir.

Q. You are speaking, then, of a meeting where some notes were put up? A. No, sir.

Q. Who else was present at that meeting, if you recall? A. How was that?

Q. Who else was present at that meeting?

A. I think most of the board of directors were present. [13] Mr. Lamm requested their presence and they came in to this meeting.

(Testimony of S. James Tuffree.)

Q. This was not the meeting where they made the levy of $175 a share, was it?

A. It was the meeting where Mr. Lamm suggested to us how——

Q. How to handle the situation?

A. How to handle the situation.

Q. Did what transpired at that meeting have anything to do with the contribution that you thereafter made?

A. He did not speak of it as a contribution.

Q. Might we be more accurate, then, and call it a payment or a purchase?

A. Purchase of depreciation.

Q. Will you state what took place at this first meeting that you mentioned?

A. Mr. Lamm explained to us that because of depreciation in the bond account the capital of the bank had been impaired and wanted to know from the directors just what they proposed to do. Various suggestions were talked over in order to take care of this depreciation of the bond account, but—that is, by the directors and officers of the bank—none of which seemed to be satisfactory to the Examiner, and I remember one distinct remark that he made. He said, "Well, boys, you are going to have to fish or cut bait, one of the two." I remember that expression. And [14] I think one of the directors asked—I don't recall which one—if he had

(Testimony of S. James Tuffree.)

any suggestions to make. And I think that, as I remember and recall—I know that he made this suggestion: That if the directors wanted that bank to remain open that they would have to purchase that depreciation in order to keep the bank open, and that they would have to get that money from outside of the bank; they would have to obtain that money from some other source and bring that in in the way of new capital. And then he proceeded to tell us how that had been accomplished or how it could be accomplished.

Q. What did he say with regard to the accomplishment?

A. As I recall, he suggested the purchasing of the amount of depreciation in the bonds; in other words, to make up the depreciation by the loan of cash to the bank.

Mr. Montgomery: Now, if you have that meeting of June 18th I would like to see that, I mean a copy.

Mr. Dockweiler: Yes; June 18th. (Handing paper to counsel.)

Q. By Mr. Montgomery: I show you a copy of the minutes, in lieu of the original, of a meeting held on the 18th day of June, 1931. Were you present at that meeting? A. Yes, sir.

The Court: Do those minutes show who was present?

Mr. Montgomery: Yes. The directors present were—he has listed them here and his name is one

of those who is [15] listed. I will offer the minute record as Plaintiffs' Exhibit 1.

The Clerk: Plaintiffs' Exhibit 1.

PLAINTIFFS' EXHIBIT No. 1.

MINUTE RECORD

Meeting Held on the 18th day of June, 1931.

The regular monthly meeting of the Board of Directors of the Anaheim First National Bank was held on the above date, President Wm. A. Dolan presiding:

Directors present were:

Wm. A. Dolan
J. H. Brunworth
Ed Kelly
F. C. Rimpau
S. James Tuffree
F. H. Dolan
L. J. Kelly
Frank Baum
Ben Baxter
Ernest F. Ganahl.

Minutes of the last regular meeting were read and approved.

Loans from No. 6008 to 6112 were read and on motion by S. James Tuffree, seconded by J. H. Brunworth, were approved.

On motion by S. James Tuffree, seconded by L. J. Kelly, expense items for the month ending with the date of this meeting were approved.

(Testimony of S. James Tuffree.)

It was moved by Ben Baxter, seconded by F. H. Dolan, and carried, that a committee be selected to collect $175.00 per share from stockholders, to be used to purchase depreciation in bond account. A total of 577 shares were represented by directors present, all of whom agreed to pay at the above rate.

The President appointed a new Bond Committee, consisting of:

S. James Tuffree
Ernest F. Ganahl
Ben Baxter
Wm. A. Dolan

WM. A. DOLAN,
President.
ROSS L. PHEGLEY,
Secretary.

Q. By Mr. Montgomery: Now, was a committee appointed for the purpose of collecting $175 a share from the stockholders? A. Yes, sir.

Q. Do you recall who was on that committee?

A. I think that the committee consisted of the names that were on that list that you submitted. I don't recall.

Q. You were one of the committeemen?

A. I was one of the committee; yes, sir.

Q. Mr. Ganahl and Baxter and W. A. Dolan?

(Testimony of S. James Tuffree.)

A. I think so.

Q. Was any bank examiner present at that meeting? A. I don't recall.

Q. Did you talk to any other bank examiner in regard to purchasing the depreciation?

A. No, sir.

Q. By the Court: Was this other meeting that you spoke of, where Mr. Lamm, the examiner, was present before this meeting or after?

A. The meeting that Mr. Lamm attended with the directors was held previous to the appointment of the committee, as I recall.

The Court: I see. [16]

Mr. Montgomery: May we have the minutes of the meeting of July 17, 1931?

Mr. Dockweiler: I find I have a copy of that. These are going into evidence, are they?

Mr. Montgomery: Yes.

Mr. Dockweiler: Or what is the purpose?

Mr. Montgomery: That is what we are doing.

Mr. Dockweiler: Has one already been introduced?

Mr. Montgomery: The meeting of June 18, 1931.

Mr. Dockweiler: That is Plaintiffs' Exhibit No. 1, is it?

Mr. Montgomery: Yes.

Q. I now show you a copy of the meeting of July 17, 1931. Do you recall being present at that meeting? A. Yes, sir.

(Testimony of S. James Tuffree.)

Mr. Montgomery: We will offer the meeting of July 17, 1931, in evidence as Plaintiffs' Exhibit No. 2.

PLAINTIFFS' EXHIBIT No. 2.

MINUTE RECORD

Meeting Held on the 17th Day of July, 1931

The regular monthly meeting of the Board of Directors of the Anaheim First National Bank was held on the above date, President Wm. A. Dolan presiding;

Directors present were:

Wm. A. Dolan
Ed Kelly
Frank Baum
S. James Tuffree
L. J. Kelly
J. H. Brunworth
F. C. Fimpau

Minutes of the last regular meeting were read and approved, as were likewise the minutes of the special meeting of June 30, 1931.

Loans from No. 6113 to 6199 were read and on motion by S. James Tuffree, seconded by L. J. Kelly, were approved.

On motion by Frank Baum, seconded by J. H. Brunworth, expense items for the month ending with date of this meeting were approved.

(Testimony of S. James Tuffree.)

The following resolution was offered by S. James Tuffree, seconded by J. H. Brumworth, and carried:

Resolved, that the $115,650 which has been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, and the $25,000 now held on books of the Bank in Reserve Account, be applied as follows:

Take up five notes of $6000.00 each formerly placed in Bank's assets by certain stockholders on account of bond depreciation.

The balance of said amount to be applied directly against the Bond Account of this Bank on account of estimated depreciation, which will reduce the present total of Bond Account by $110,650. Be it further resolved that as further payments be received from stockholders on account of purchase of bond depreciation, that such sums shall be applied on Bond account as above specified.

Adjournment,

WM. A. DOLAN,
President.

ROSS L. PHEGLEY,
Secretary.

Q. Now, was there some discussion on the meeting of July 17, 1931, as to the intention in making this purchase and of how it was to be paid back?

(Testimony of S. James Tuffree.)

A. It was to be paid back as and when the bank could pay that back out of its bond appreciation, or as the bonds appreciated in value. It was to be paid back in that way.

Q. Did you know at the time you made your contribution or purchase, I should say, what your liability as a stockholder was? [17]

A. I knew of my stockholder's liability when I first purchased my stock.

Q. You knew it at that time? A. Yes, sir.

Q. And at all times subsequently?

A. Yes, sir.

Q. What was your understanding as to your stockholder's liability?

A. That we were liable for——

Mr. Chipkin: Objected to, your Honor, as being incompetent, what his understanding is.

Mr. Dockweiler: I would also raise the objection that it is immaterial, your Honor, on the ground that contributions to a bank by directors or stockholders are a wholly independent matter from stockholders' liability.

The Court: You may have the objection. I want to hear the evidence. You may have the objection and exception, and I will overrule the objection.

The Witness: Answer?

Mr. Montgomery: Yes, sir.

A. I did know what the stockholder's liability was.

(Testimony of S. James Tuffree.)

Q. No. But I say, what was it? A. $100.

Q. $100 a share? A. Yes, sir.

Q. Then your contribution was what? [18]

A. $175.

Mr. Montgomery: You may cross-examine. [19]

Cross Examination

Q. By Mr. Dockweiler: Mr. Tuffree, how long were you a director of this Anaheim First National Bank, that is, commencing with what year?

A. I think all told, approximately from three to four years.

Q. That is prior to 1931?

A. No. I believe possibly it was in '28, 1928.

Q. In other words, you started in 1928 and continued up until the time the bank was taken over by this receiver, Mr. Hogan, the gentleman——

A. (Interrupting) As I recall.

Q. Yes. In other words, from about 1928 to 1934?

A. May I fix the time approximately? I first became affiliated with the First National Bank of Anaheim just prior to the time that Mr. Dolan sold the bank to Mr. Baum. I purchased some stock during the time that Mr. Dolan owned the bank with his brother and other old settlers that were interested in that bank. I was not a resident of Anaheim, but I have some business connections in Anaheim and became affiliated with the bank just prior to the time Mr. Dolan sold it to Mr. Baum.

Q. Yes. Then you think that is around 1928?

(Testimony of S. James Tuffree.)

A. I would say approximately so.

Q. Yes. And you continued as a director up until the time that the comptroller of the currency took the bank over [20] in 1934? A. That is right.

Q. Now, you attended the meetings with regularity, that is, the directors' meetings?

A. I think so.

Q. In other words, you attended many of the directors' meetings, did you not?

A. Yes, sir.

Q. You would say about once a month, would you not, on the average? A. Approximately so.

Q. And at those meetings the condition of the bank as to its assets and liabilities, and possibly capital impairment, was often discussed, was it not, we will say, beginning early in 1930?

A. I would say that it was discussed after Mr. Baum became attached with the bank quite frequently.

Q. Of course, the depression had meanwhile swept over the country, and in early 1930 the bank —exception had been taken to the condition of the bank by Mr. Baum, the bank examiner, had it not?

A. Mr. Baum was not the bank examiner. Mr. Baum was the purchaser, the man that purchased Mr. Dolan out.

Q. Mr. Lamm, the bank examiner, he had explained to the Board, had he not, on several occasions that the Comptroller did not consider the

(Testimony of S. James Tuffree.)

bank in a good financial condition; [21] that its capital had been impaired?

A. Not during the years that I was on the Board.

Q. No. I am saying, beginning with early 1930.

A. I don't recall.

Q. Well, maybe I can refresh your mind, Mr. Tuffree, by referring you to the directors' meeting of July 16, 1930. And, for the purposes of letting the witness refresh his memory I would like to give him the original minute book, with two letters attached to the minutes, recordation of minutes. Now, you have before you the minutes of July 16, 1930. You recall having attended that meeting, do you not? It would appear that your name is on the list?

A. July the 16th I was not present, according to the minutes.

Q. Well, we will take the next meeting, which is—— A. August.

Q. —August 20, 1930. Now, you were present at that meeting, were you not? A. Apparently.

Q. Yes. And it would appear, would it not, that the minutes of the last regular meeting were read and approved? A. Yes.

Q. And the last regular meeting prior to that was this July 16th meeting, was it not, the previous month's meeting? A. Yes.

Q. And I will call your attention, Mr. Tuffree, to two [22] letters that are attached to and made a part of the minutes of July 16, 1930, and are the

(Testimony of S. James Tuffree.)

two letters referred to, or purporting to be the two letters referred to in the minutes under this entry which is a part of the minutes, and I am now reading from the minutes of July 16, 1930: "Letters from the Treasury Department, addressed to the Board of Directors of the Anaheim First National Bank, dated July 2nd, 1930, was read and President was instructed to reply to this letter, copy of which reply is being held on file at this bank."

Mr. Montgomery: Now, may I interpose an objection at this time and ask what counsel's purpose is in going back to a meeting a year or so before this particular purchase was made?

Mr. Dockweiler: The object I have in view, your Honor, is to show that the condition of this bank for a year and a half prior to these contributions, or as opposing counsel would term it, purchases of bond depreciation made, was in bad condition; that the directors knew it; that the matter was taken up with the Comptroller of Currency and the Comptroller of the Currency defined his position as to what would have to be the nature of the contribution.

The Court: Apparently at the time they did make the contribution the situation was exactly as you now represent it to have been at and prior to the time, so they knew it then and whatever response they made, they made in response to that condition. [23]

(Testimony of S. James Tuffree.)

Mr. Dockweiler: But I should like the opportunity to show a continuing knowledge by the officers of the bank of the conditions under which they could make their contributions, as defined.

The Court: Suppose you ask the witness generally as to his knowledge of the prior time and see whether he is able to respond without reference to the minutes.

Mr. Dockweiler: Yes.

Q. Do you recall whether or not at any meetings of the directors prior to July or June, 1930, any letters to or from the Comptroller of the Currency with reference to the Anaheim First National Bank were read to the directors?

Mr. Montgomery: Now, I object to that as immaterial, irrelevant and incompetent unless it is shown that it has to do with the particular purchase that they made.

Q. By Mr. Dockweiler: And with reference only—I will add this to my question: With reference to repairing the capital impairment of the bank?

Q. By the Court: Pardon me for interrupting you. You knew the situation as it was at the time you made your contribution, as has been explained. How long, to your knowledge, had that situation existed?

A. I don't remember this particular letter referred to that has just been read at this meetin

(Testimony of S. James Tuffree.)

that I was not present. But I knew one thing, that shortly after Mr. Dolan sold the bank to Mr. Baum, that there was some transactions [24] in bonds which I personally did not approve of and so told Mr. Baum about.

Q. That was what date, about?

A. Well, it was in the interim between the time Mr. Dolan first sold and when he and his brother purchased back the controlling interest in the bank.

Q. Can you fix either date?

A. No. I should——

Q. Approximately?

A. No; I could not fix the date approximately.

Q. A year?

A. You see, this has been—the bank has been closed now for about three or four years, as I recall, about three or four years, and these happenings are back five or six years ago, so it is rather difficut for me to remember the details. I do know, however, your Honor, that there was certain bond transactions after Mr. Baum came in the bank which I did not approve of, and he offered to buy my stock out and when I offered to sell it to him, why, he refused to buy it.

Q. By Mr. Dockweiler: I will ask you whether you ever had any objections of yours to the way the bond account was being handled spread upon the minutes of the meetings of the directors, or did you

(Testimony of S. James Tuffree.)

ever take any further or other action than merely objecting to Mr. Baum?

Mr. Montgomery: I object to that as immaterial. We [25] are going now to a collateral issue. The situation is: The sole question is what was the intention and understanding and agreement at the time they made this purchase of the deficiency in the bond account. Now, if there is anything that bears upon his knowledge prior to that date, why, of course that would be material; but the fact that he objected to the handling of the bond account prior to this date would not have any materiality.

The Court: It is your position that a long-continued prior dangerous condition influenced them to understand that they could not expect the money back?

Mr. Dockweiler: That is it.

The Court: I see. I will allow you to answer.

Mr. Dockweiler: Do I understand your Honor's ruling on it to be——

The Court: He may answer the question.

The Witness: Would you reframe that question, please?

Mr. Dockweiler: Read the question.

(Question read by the reporter.)

A. No; I never had any—I never took any action before that, placed upon the minutes, but it was discussed in Mr. Baum's presence.

(Testimony of S. James Tuffree.)

Q. But that is the extent of your objections or the relief you sought to get as a director?

A. Well, in one point in instance, a simple instance, we had some stock, some water company stock which he wanted [26] to get—which he wanted to sell, some Anaheim Union Water Company stock which he did not know the value of. It is a local concern there in Orange County and he wanted to sell that stuff and buy some Fox Film. I am not in any way connected with the motion picture industry at all, but his idea was to sell some of those bonds and buy some of these other bonds.

Q. Well, briefly, you objected to that?

A. We objected and discussed it at the board of directors' meeting.

Q. But that was the extent of what was done, these maybe even heated discussions between you and Mr. Baum?

A. Yes; during the directors' meetings.

Mr. Dockweiler: I had asked a previous question, may it please the court, to which Mr. Montgomery interposed an objection as to whether or not this gentleman had ever heard read that exchange of letters which I referred to as being a part of the minutes of the meeting of July 16, 1930, and I do not think your Honor has ruled upon that.

The Court: Well, he may answer. Of course, I expect to hear your arguments on the proposition

(Testimony of S. James Tuffree.)

which you propose to maintain here. I am not making up my mind upon the law now but am allowing him to testify.

A. I was not present when this letter was read from the Treasury Department, as the minutes will show.

Q. By Mr. Dockweiler: Well, did you ever hear it read [27] at the subsequent meeting or at any other meeting?

A. Not this particular letter referred to.

Q. And you did not hear that letter discussed?

A. Not at this meeting.

Q. Well, at any time?

A. Not previous to the writing of these letters. I was not at this meeting.

Q. Well, subsequent to the writing of the letters? I have referred to a letter of July 2nd, 1930, addressed by E. H. Gough, Deputy Comptroller, to the Board of Directors, Anaheim First National Bank, and a purported reply to it by W. A. Dolan, as president of the Anaheim First National Bank, under date of July 17th, to E. H. Gough, Deputy Comptroller. Do you recall ever having heard those letters discussed subsequent to the date of July 16, and bearing in mind that Mr. Dolan's purported answer is dated July 17th, the day after the meeting?

A. I don't recall.

Q. Yes. Well, I will refer you to the minutes of the meeting of September 17, 1931, a little over a

(Testimony of S. James Tuffree.)

year later. For the purposes of refreshing your recollection, Mr. Tuffree, I expose to you what purports to be the minutes of the meeting of the directors of September 17, 1931, and I will ask you whether or not you recall having been present at that meeting?

Mr. Montgomery: I object to that as subsequent to the [28] transaction in question, and unless it amounts to an interpretation of what had previously taken place it is immaterial, irrelevant and incompetent.

Mr. Dockweiler: That is what we claim it to be, a matter of interpretation, as it was a matter of continuous correspondence between the Comptroller and——

The Court: We will hear it and the objection may be overruled and exception noted.

Mr. Dockweiler: Yes.

A. Was I present?

Q. Yes. A. Yes, sir.

Q. Inviting your attention to only that portion of the minutes which state this: "A letter from the Treasury Department dated Aug. 20th and Mr. Dolan's reply thereto dated September 8th were read and ordered filed." Now, there appear to be attached to the minutes of that meeting the two letters referred to, and I will ask you whether you remember the reading of those two letters on that occasion?

(Testimony of S. James Tuffree.)

Mr. Montgomery: I would make particular objection to the letter from the Comptroller as not being binding on us.

Mr. Dockweiler: A part of the general transaction, your Honor, preliminary to Mr. Dolan's answer, Mr. Dolan being at that time the president of the bank. But if it would be stipulated that the Mr. Dolan referred to is the president of the bank —I should like to ask that one question. [29]

Mr. Montgomery: I think he was. Wasn't he?

Mr. Dockweiler: William A. Dolan.

Q. Mr. Tuffree, for the purposes of the record, will you state whether Mr. William A. Dolan was president of the bank at the time of this meeting in September, 1931?

A. September 8th, you say?

Q. Well, September 17, 1931.

A. I think he was.

Q. He was, was he not? He had been for a considerable time prior thereto, for something like, would you say, a year and a half or two years pretty near? A. Possibly so.

Q. Possibly two continuous years prior thereto. Your answer would be "Yes"?

A. As I remember these letters being read?

Q. On the question of how long prior to 1931, September, 1931, was Mr. W. A. Dolan president of the bank?

A. As to the time I could not swear just how long. I think that he was—I know that he again became president after Mr. Baum had sold out to Mr. Dolan and his brother.

Q. Then, have you any recollection as to when Mr. Baum sold out to W. A. Dolan and his brother?

A. No; I have not.

Q. Refreshing your memory on those two letters, what is your recollection as to whether you heard them read or not?

A. I remember having heard some of the letters read [30] from the Treasury Department.

Q. And Mr. Dolan's drafted replies to them, as well?

A. The reply was usually read; yes, sir.

Q. And I suppose that the letter was from the Treasury and the proposed reply was a matter of general discussion among the directors, is that not right? A. Yes, sir.

Q. As a matter of fact, wasn't it about the most important business before the meeting whenever that problem of impairment of the capital of the bank was discussed?

Mr. Montgomery: Now, that is indefinite as to time.

Mr. Dockweiler: Well, we will say on this occasion in September, 1931.

A. I think that the impairment of all the banks' capital was discussed in a general way and this bank

(Testimony of S. James Tuffree.)

possibly in particular in regards to its bond account and the depreciation, which was quite general because of the times that we were going through at that particular time.

Q. And was discussed for many months prior to September, 1931, was it not, between the directors individually, the directors and the officers, and the directors in sessions at directors' meetings, was it not?

A. I think that all of the bank's official affairs were discussed at every meeting.

Q. Wasn't it a fact that the bank was being pressed by the Examiner, Mr. Lamm, to correct a bad condition, at least [31] what was called a bad condition by himself and the Comptroller's office?

A. In regard to the depreciation of the bonds.

Q. In regard to the capital, that is, impaired capital of the bank?

A. He discussed the bond depreciation with the directors; yes, sir.

Q. And, of course, the bond depreciation had its reflection in a bad capital condition, did it not?

A. Evidently.

Q. In other words, many of these bonds, we will say, were bought at, for instance, taking 100 as the standard figure, and had gone away down below 50 had they not?

(Testimony of S. James Tuffree.)

A. Some of them had very badly depreciated.

Q. And others not so badly. But, in other words, it did impair the fiscal condition of the bank?

A. Yes, sir.

Q. And was a matter of discussion for many months?

A. I know it came up for discussion. As to how long, I don't recall just the exact length of time.

Mr. Montgomery: I think, your Honor, we could concede that it was for at least a year prior to this, and maybe longer, if they want it, that there was that condition and it was under discussion.

Q. By Mr. Dockweiler: Now, I will ask you refresh your mind on paragraphs 1 and 4 of the letter of August 20, 1931, [32] from Deputy Comptroller Gough to the Board of Directors of the Anaheim First National Bank.

Mr. Montgomery: May I inquire, have you copies of these letters?

Mr. Dockweiler: Yes. As a matter of fact, I think it would probably be simpler. I have given to opposing counsel what we will tentatively regard as the copies, your Honor, and if they wish to compare them we will hold ourselves ready to compare them; and if they are agreeable to letting them go in under stipulation as being copies—one is a certified copy—under the general law as to certification by the Comptroller's office.

(Testimony of S. James Tuffree.)

I would like to read those two paragraphs in order to you some questions. Reading from the August 20th letter of the Deputy Comptroller Gough to the Board of Directors of the Anaheim First National Bank.

"Gentlemen:

"A capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in his report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash, and $41,875 in the form of fourteen ninety-day notes. There were still eighteen stockholders to [33] interview and obtain contributions from."

Then the fourth paragraph of the same letter:

"Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard."

(Testimony of S. James Tuffree.)

Now, Mr. Tuffree, was——

Mr. Montgomery: In order to keep my record straight, may it be understood that my objection runs to this letter as being subsequent?

The Court: Yes.

Mr. Montgomery: And not binding upon us?

The Court: It will be so agreed and exception will be carried in the record in your favor.

Mr. Dockweiler: Now you are permitted to answer the question.

Q. Was that phase of the letter of the Comptroller's office discussed as to the voluntary character without expectation of reimbursement?

A. You will notice that the Examiner W. J. Waldron is mentioned here.

Q. That is it.

A. I want to say that Mr. Waldron never offered any [34] solution as far as the bank was concerned as to how this could be taken care of. It was Mr. Lamm made the suggestion, not Mr. Waldron.

Q. But Mr. Waldron did make a report on the bank?

A. And subsequent to our loan.

Q. Well, now, as of June 24th he is reported to have completed an examination and ascertained an impaired capital. Now, I will ask whether or not those two paragraphs of the Comptroller's letter were discussed by the directors at that meeting?

A. The letter of August the 20th, you mean?

(Testimony of S. James Tuffree.)

Q. Yes.

A. Yes; I think that they were discussed.

Q. Was Mr. Dolan, as president of the bank, or anyone else, directed to reply to the Comptroller's office that you gentlemen had not made voluntary contributions without expectation of reimbursement, but that they were purchases of a depreciation in a bond account and that the bank was obligated to pay the money back?

Mr. Montgomery: Well, I object to the question as multifarious. Let us find out what the directions were.

Mr. Dockweiler: Well, I will ask the simple question:

Q. Did the directors or any of them direct or instruct Mr. Dolan, as president of the bank, or anybody else, to answer the Comptroller by stating any position that may have been discussed at the meeting as the position of the [35] directors with reference to those two paragraphs of the Comptroller's letter?

A. I don't know whether Mr. Dolan replied to that letter of his own volition or at the request of the Board.

Q. But his reply was read, was it not?

A. It says here in those minutes here that the letter from the Treasury Department of August 20th and Mr. Dolan's reply thereto, dated September the 8th, were read and ordered filed.

(Testimony of S. James Tuffree.)

Q. And ordered filed. So, then, do you recall that letter in extenso was read and Mr. Dolan's draft of reply or actual reply, whatever it was, at the time?

A. I don't recall the particulars.

Q. Yes.

A. That is 1931 and this is 1937.

Mr. Dockweiler: Yes. At this time I should like to introduce into evidence as Defendant's Exhibit 1 the letter addressed to the Board of Directors of Anaheim First National Bank, Anaheim, California, dated August 20, 1931, and signed by E. H. Gough, Deputy Comptroller of the Currency, and for convenience, in view of the fact that the photostat which is prepared under Section 884 of the Revised Statutes is a little difficult to read, I have had a bold copy prepared, your Honor.

Mr. Montgomery: We have no objection to the copy, but we have an objection to the letter which we previously [36] stated.

The Court: Yes.

Mr. Montgomery: As immaterial, irrelevant and incompetent.

Mr. Dockweiler: I am perfectly willing also, for the purposes of economy, to have any comparisons made that the gentlemen may wish to make and if there are any errors—we have carefully gone through that once before, your Honor—but if there are any

(Testimony of S. James Tuffree.)

errors found, we will be very happy to make the necessary corrections.

The Clerk: Defendant's A.

DEFENDANT'S EXHIBIT A.

CERTIFICATE FOR CERTIFIED COPY

Treasury Department,
Office of the Comptroller of Currency—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete photostat copy of a copy of the original letter addressed to the Board of Directors of the Anaheim First National Bank, Anaheim, California, dated August 20, 1931, and signed by E. H. Gough, Deputy Comptroller, and of the whole of such original on file and of record in this office.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this twenty-ninth day of January, A. D. 1936.

[Seal] (Signed) F. G. AWALT,
Acting Comptroller of the Currency.

(Testimony of S. James Tuffree.)

Sa-12 FU Waldron Harris 5-10228

August 20, 1931.

Board of Directors,
Anaheim-First National Bank,
Anaheim, California.

Gentlemen:

A capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in his report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash and $41,875 in the form of fourteen ninety-day notes. There were still eighteen stockholders to interview and obtain contributions from.

Please write this office on September 1 and advise whether the committee appointed to collect from shareholders has succeeded in making the additional collections, and submit a list showing the individual cash contributions, and the contributions that have been made in the form of notes. The notes should be fully described.

Also please have executed and forwarded the enclosed form marked "affidavit" certifying to the fact that capital has been restored to $75,000.

Although you have been previously advised in this regard this office wishes to bring to your at-

(Testimony of S. James Tuffree.)

tention again at this time the fact that contributions made to restore capital should be made unconditionally and without expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard.

You are requested also to advise the collections that have been made of slow and doubtful loans and loans especially mentioned; the further collections expected soon; whether you have sold or have prospects of selling any of the real estate owned; have reduced aggregate borrowed money, obligations at the Citizens National Bank, Los Angeles, to $75,000, the limit prescribed by Section 5202, U. S. R. S. and have succeeded in further reducing the total of the bank's borrowed money, which was $188,735 on the date of examination.

You are requested to attach to your reply a copy of your daily statement as of the preceding business day, and to send duplicates of letter and statement to Chief National Bank Examiner T. E. Harris, 155 Montgomery St., Room 1103, San Francisco, Calif., and to National Bank Examiner W. J. Waldron, 1548 West Washington St., Santa Ana, Calif.

Respectfully,

Deputy Comptroller.

Enclosure

Mr. Montgomery: Counsel is going to put in the reply also?

Mr. Dockweiler: Yes. I think for the purposes of the record that we ought to put in the reply rather than attempting to read it from the minute book.

Mr. Montgomery: Yes.

Mr. Dockweiler: At this time defendant introduces as Exhibit B, Defendant's Exhibit B, copy of the letter of W. A. Dolan, as president of the bank, dated September 8, 1931, to E. H. Gough, Deputy Comptroller.

The Clerk: Exhibit B.

DEFENDANT'S EXHIBIT B

September 8, 1931.

Mr. E. H. Gough, Deputy Comptroller,
Treasury Department,
Washington, D. C.

Dear Sir:

We have your favor of August 20 and wish to make the following reply to your letter of the above date.

Regarding the amount of $94,400.53 which was shown by the National Bank Examiner as being a capital impairment, will say that the above amount was estimated on account of an estimated depreciation in our bond account. The following stockholders purchased the depreciation with the understanding that the bonds were to be held or exchanged with a view of the same liquidating the amount subscribed:

(Testimony of S. James Tuffree.)

Wm. A. Dolan	Cash,	$32,500.00					
F. H. Dolan	"	32,500.00					
Ben Baxter	"	1,750.00					
Lawrence J. Kelly	Note of	$4900,	dated	July	11-31,	due 90 days	
Ernest F. Ganahl	Note of	$1750,	"	"	7-31,	due 6 months	
Frank Baum	"	" $5250,	"	"	6-31,	due 90 days	
S. James Tuffree	"	" $3000,	"	"	3-31,	due 90 days also, $500 cash	
Ed Kelly	"	" $9000,	"	"	8-31,	due 6 months	
Fred C. Rimpau	Cash,	$1925.00					
Sophie Rimpau	Cash,	$1750.00					
F. A. Yungbluth	Note of	$1750,	dated	July	14-31,	due 90 days	
F. K. Day	"	" $875,	"	"	14-31,	due 90 days	
Minnie Baxter	Cash	$850.00,					
	Note of	$3000,	"	"	15-31,	due 90 days	
M. Del Giorgio	Note of	$875,	dated	July	15-31,	due 90 days	
Jennie Pomeroy	Cash,	$2000,					
	Note of	$1500,	dated	July	15-31,	due 90 days	
D. A. Woodward	Note of	$1225,	dated	July	16-31,	due 90 days	
J. W. Truxaw	"	" $1750,	"	"	16-31,	due 90 days	
J. W. Brunworth	"	" $5250,	"	"	9-31,	due 90 days	

(Testimony of S. James Tuffree.)

Regarding the slow and doubtful loans, the following collections have been made:

H. G. Ames	$150.00
W. M. Drennon	110.00
Henry J. Du Bois	985.00
V. W. La Mont	350.00
J. M. McDuell	Secured
H. B. Pearson	$3000.00
Weber Book Store	75.
L. N. Wisser	100.

On other loans especially mentioned, the following amounts have been paid:

A. Auget	$ 677.30
D. A. Collins	1000.00
Mrs. Julia Donnelly	4300.00
August Eltiste	300.00
Kurt Epstein	4103.12
J. J. Spitzer	4003.13
E. F. Gielow	1634.63
Geo. B. Creder	564.83
Lena Jay	1500.00
J. W. Johnson	200.00
H. M. Miller	250.00
Geo. A. Paige	300.00
Fred C. Rimpau	6000.00
Herman Stern	1500.00

We are negotiating a sale on the property, held under Real Estate, in the City of Los Angeles, and payment has been made on contract. We also have a prospect of selling the orange groves located in

(Testimony of S. James Tuffree.)

Orange County which, if consummated, will reduce our Real Estate considerably.

The borrowed money obligations at the Citizens National Bank have been paid in full.

We enclose form marked "affidavit" certifying to the fact that capital has been restored to $75,000.

In compliance with your request, we attach herewith a copy of our daily statement as of September 5 and also enclose copy of same, and also duplicated of this letter, to Chief National Bank Examiner T. E. Harris and to National Bank Examiner W. J. Waldron.

The writer wishes to apologize for not answering this letter on September as I was on my vacation and this is the first opportunity I have had to reply. I trust that you will pardon the delay. I remain

Yours respectfully,

President.

WAD/DE

Mr. Montgomery: We make no objection to Exhibit B, your Honor, because that states the understanding.

Mr. Dockweiler: Yes.

Now, subsequently I take it there was further discussion [37] of this bond impairment matter and the way to clarify it, was there not, in the next few weeks? In any event, you were still collecting

(Testimony of S. James Tuffree.)

money under the proposed document that had been circulated among the stockholders and bondholders; you were still collecting money under it, were you not?

A. I don't recall.

Q. But for all you know, the gentlemen directly in charge of what we would call the "contributions" and you call the "purchase" were going around, or they might have been going around collecting money under that?

A. Well, I was on that committee to go around to get these people to make this loan in order to keep our bank open; but I do not believe that we made any attempt after we received Mr. Waldron's report to—— that is, on my part, at least. I would not knowingly go around and ask anyone for a contribution of $175 a share after Mr. Waldron objected to it in the way he did. I do not recall that I personally went around.

Q. Yes.

A. I could not very well go around and ask the stockholders to loan money to a bank after the Comptroller of the Currency, or Mr. Waldron here, as evidenced in this letter, objected. I know that there was for awhile, why, we were very active in trying to get this money to take care of the impairment of the capital.

Q. Now, I will ask you in refreshing your memory to [38] refer to the minutes of the directors'

(Testimony of S. James Tuffree.)

meeting of November 19, 1931, which I take it to be the next regular monthly meeting after the on you have just testified to in——was it September This is the second one. I will ask you whethe you recall having been present at that meeting?

Mr. Montgomery: Is this another subsequen meeting?

Mr. Dockweiler: Yes.

Mr. Montgomery: I make the same objection tha it was subsequent and not binding upon us. Thi does not purport to construe anything.

The Court: Gentlemen, I don't know what it is of course.

Mr. Dockweiler: May it be admitted temporar ily, to be connected up? If it is not, it will be sub ject to a motion to strike your Honor.

The Court: Very well.

Q. By Mr. Dockweiler: I will invite your at tention to that part of the minutes which reads a follows: "A letter from the Comptroller unde date of October 30th was read and it was directe that a reply be made thereto." And now I refe to the letter from the Comptroller again, directe to Board of Directors, Anaheim First Nationa Bank, purporting to be signed by E. H. Gough Deputy Comptroller, dated October 30, 1931, an I will ask you whether you recall that having bee read at the meeting of——

A. (Interrupting): No; I don't recall this let ter. [39]

(Testimony of S. James Tuffree.)

Q. You don't recall the letter. You were present at the meeting, were you not, however?

A. According to these minutes, I was.

Q. Then would you say the minutes were untrue——

A. No; I would not say.

Q. ——in that the letter was not read?

A. No, sir. I would lay my not remembering this in particular to a faulty recollection.

Q. Well, would you say it might have been read and that your recollection is faulty?

A. Possibly so.

Mr. Dockweiler: At this time we should like to introduce as Defendant's Exhibit C the minutes of the meeting of the Board of Directors held November 19, 1931, in the form of a copy from the minute book.

DEFENDANT'S EXHIBIT C.

MINUTE RECORD

Meeting held on the 19th day of November, 1931.

The regular monthly meeting of the Board of Directors of the Anaheim First National Bank was held on the above date, President Wm. A. Dolan presiding.

Directors present were:

Wm. A. Dolan
Ernest F. Ganahl
L. J. Kelly

(Testimony of S. James Tuffree.)

J. H. Brunworth
Frank Baum
Ben Baxter
C. H. Myers
S. James Tuffree

Minutes of the last regular meeting were read and approved.

Loans from No. 6457 to 6535 were read and on motion by S. James Tuffree, seconded by J. H. Brunworth, were approved.

On motion by S. James Tuffree, seconded by C. H. Myers, expense items for the month ending with the date of this meeting were approved.

A letter from the Comptroller under date of October 30th was read and it was directed that a reply be made thereto.

Adjournment.

President
WM. A. DOLAN
ROSS L. PHEGLEY
Secretary

Mr. Montgomery: We have no objection to the copy, but we make the same objection that it is subsequent and is irrelevant, incompetent and immaterial, an attempt to change the contract, or, rather it is an item of evidence attempting to change the contract that actually was made.

(Testimony of S. James Tuffree.)

The Court: I will let the exception show and the objection be presently overruled. I expect to hear you on the argument on all those questions, nevertheless.

Q. By Mr. Dockweiler: I note from the minutes what purports to be very little business at that meeting, except the reading of the letter from the Comptroller and I should [40] like to know whether or not at that meeting you have any recollection that there was discussion of that depreciation in the bond account and the point raised by the Comptroller in his letter, and I refer to this part of the letter, the paragraph second of paragraphs one and two, reading as follows: From the Comptroller of the Currency, letter of October 30, 1931.

"Gentlemen:

"Referring to the president's letter of September 8, and particularly that portion regarding the depreciation in your bond account, please advise which of the shareholders' notes aggregating $40,125 placed in the bank in this connection which, with two exceptions, became due this month have been paid. In addition to these notes cash contributions of $73,775 were reported to have been made by September 8 to provide for the heavy bond depreciation. In your reply please state whether you were successful in obtaining any additional collections from the remaining shareholders, and if so what they were in cash."

(Testimony of S. James Tuffree.)

This being the second paragraph:

"It should be clearly understood by all parties concerned that these contributions are voluntary and unconditionally made, with no expectation of reimbursement from the profits or earnings of the bank."

Now, I will ask you whether you recall on that occasion [41] any discussion as to what I would call voluntary contributions, what your counsel would call purchases, of the bond depreciation?

Mr. Montgomery: What was the question there the first part?

(First part of counsel's question read by the reporter.)

A. No; I don't recall any particular discussions in regard to that at this particular meeting.

Q. By Mr. Dockweiler: Having in mind these letters received by the board of directors, addressed to the board of directors of the bank, did it ever occur to you that the Comptroller of the Currency at Washington was insisting that whatever was gathered together in the way of additional capital for the repairment of the impaired capital should be free, untrammeled, unconditional, and wasn't that a matter of discussion between you men?

A. It might have been up for discussion, but we had already made this loan to the bank in order to take care of that depreciation, and the discussion in regard to it in view of these letters was nothing

(Testimony of S. James Tuffree.)

more nor less than telling us that after we had already made that loan in good faith——

Q. Did you ever advise in reply to any of these letters, or did the board, you being one of them, ever direct the president or any other officer to reply to the Comptroller, telling him that you did expect that you would get reimbursed through appreciation, or that you had bought the [42] depreciation which would redound to your benefit in the way of appreciation of the bond account if it ever occurred?

A. Personally, I never have written any letter to the Treasury Department.

Q. Well, did you as a director ever instruct the president or any other officer to do it?

A. I know certain letters were requested. Certain letters demanded an answer and these answers were made by the president.

Q. Yes. And you were familiar with the answer that the president made to the Comptroller, were you not? A. Yes.

Q. That also being read, I take it, at the same meeting? A. In a general way; yes.

Q. Or discussed as to what he should say in reply?

A. I don't recall just what our discussions were seven years ago, six years ago.

Mr. Dockweiler: At this time for the purposes

(Testimony of S. James Tuffree.)

of the record, having already introduced the copy of the minutes, we offer as Defendant's Exhibit 4 a copy of the letter dated October 30, 1931, addressed by Deputy Comptroller Gough to Board of Directors of Anaheim First National Bank.

The Court: Subject to the same objection and exception.

Mr. Montgomery: Yes, your Honor.

Mr. Dockweiler: And then what purports to be the answer thereto as appearing by the minutes, by a letter of [43] President W. A. Dolan to Gough, Deputy Comptroller, under date of November 20, 1931. And that would be exhibit?

The Clerk: E.

Mr. Montgomery: I think you said "4". The other one should be D and E.

The Clerk: D and E.

Mr. Dockweiler: Yes. In other words, the Deputy Comptroller's letter now being offered will be D—how could that be? We have already introduced—well, all right; D. And the president's reply to the Comptroller would be E?

The Clerk: E.

Testimony of S. James Tuffree.)

DEFENDANT'S EXHIBIT D

CERTIFICATE FOR CERTIFIED COPY

Treasury Department
Office of the
Comptroller of the Currency—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete photostat copy of a copy of the original letter to the Board of Directors of the Anaheim First National Bank, Anaheim, California, dated October 30, 1931, and signed by E. H. Gough, Deputy Comptroller, and of the whole of such original on file and of record in this office.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this twenty-ninth day of January, A. D. 1936.

[Seal] (Signed) F. G. AWALT
Acting Comptroller of the Currency

(Testimony of S. James Tuffree.)

October 30, 1931

Board of Directors,
Anaheim-First National Bank,
Anaheim, California.

Gentlemen:

Referring to the president's letter of September 8, and particularly that portion regarding the depreciation in your bond account, please advise which of the shareholders' notes aggregating $40,125 placed in the bank in this connection which, with two exceptions, became due this month have been paid. In addition to these notes cash contributions of $73,775 were reported to have been made by September 8 to provide for the heavy bond depreciation. In your reply please state whether you were successful in obtaining any additional collections from the remaining shareholders, and if so whether they were in cash.

It should be clearly understood by all parties concerned that these contributions are voluntary and unconditionally made, with no expectation of reimbursement from the profits or earnings of the bank.

The president reported that you were negotiating a sale of the property in Los Angeles on contract at the time his letter was written and that you also had a prospect of selling the orange groves which if consummated would considerably reduce your "other real estate" account. Please advise whether you

(Testimony of S. James Tuffree.)

were able to close this sale and if so, on what terms, and give the amount of the payment made on the contract covering the sale of the city property.

Also advise of any further changes that have occurred in the loans unfavorably commented upon throughout the June report of examination, and of any further reduction made in the bank's obligations for money borrowed.

Respectfully,

(Signed) E. H. GOUGH

Deputy Comptroller

DEFENDANTS' EXHIBIT E

Anaheim, Calif.
November 20, 1931

Mr. E. H. Gough, Deputy Comptroller,
Treasury Department,
Washington, D. C.

Dear Sir:

"Your letter dated October 30, 1931, was read to the Board of Directors of this bank at its meeting held yesterday.

In reply to your question regarding the notes given by shareholders for bond depreciation, will say that the note given by J. J. Dwyer for $1750 has been paid. The other notes are still held by this bank. We have not made any further collections from the remaining shareholders up to this date.

(Testimony of S. James Tuffree.)

In regard to "other real estate" held, will say that payment has been made on the property in Los Angeles and contract for sale is pending, also, sale of the orange grove has not been consummated but are using our best endeavors to sell same.

The following changes have been made in our loans since we wrote you on September 8, 1931.

H. G. Ames, is reducing monthly.
Anaheim Feed & Fuel, reduced to $1893.08.
J & N Shop, reduced to $128.83.
V. W. LaMont, reducing by monthly payments.
Jos. Sparkes, reduced $100.
Weber Book Store, reducing monthly.
Walter Amstutz, reduced to $4339.82.
E. A. Collins, paid in full.
Kurt Epstein, reduced to $2285.41.
J. J. Spitzer, paid in full.
E. F. Gielow, reduced to $1130.
J. W. Johnson, paid in full.
Victor G. Loly, reduced to $250.
Edith O'Reilly, reduced to $115.12.
George A. Paige, paid in full.

I also wish to advise that the bank has no borrowed money.

Trusting the above information is satisfactory, I remain

Yours respectfully,

President

WAD.DB

(Testimony of S. James Tuffree.)

Mr. Montgomery: And objection to the reply as well.

The Court: Yes; it is understood.

Mr. Dockweiler: And the pertinent part of the reply that I have in mind, some of it being irrelevant and referring apparently to loans, is simply the first paragraph.

"Mr. E. H. Gough, Deputy Comptroller,

"Dear Sir:

"Your letter dated October 30, 1931, was read to the Board of Directors of this bank at its meeting held yesterday."

Mr. Montgomery: And the letter does not mention anything about the bond issue—I mean the purchase.

Mr. Dockweiler: It does not refer in any way to the—we will call it "purchase" of the bond depreciation. [44]

Mr. Montgomery: Thank you.

Mr. Dockweiler: Except my attention is invited to the second paragraph which may have some relevancy and probably should be read just for the purpose of the record.

"In reply to your question regarding the notes given by shareholders for bond depreciation, will say that the note given by J. J. Dwyer for $1,750 has been paid. The other notes are still held by this bank. We have not

(Testimony of S. James Tuffree.)

made any further collections from the remaining shareholders up to this date."

Q. Do you know whether, subsequent to the date of November 20, 1931, any collections were made by your sub-committee?

A. No; I don't.

Q. They may or they may not have been made, I take it? A. Yes.

Q. Having been advised by the Comptroller's office of what their position was on repairing of impaired capital, did you ever do anything to attempt to advise the Comptroller's office that you had bought what you called the bond depreciation and you expected to get reimbursement of your contribution or payment, whatever you wish to call it, from appreciation in the bond account if appreciation ever occurred?

Mr. Montgomery: Well, I object to that as immaterial, irrelevant and incompetent, and also as already having been [45] answered. We have a letter here from the president stating what the basis of contribution was, or, rather, of the purchase.

Mr. Dockweiler: Your Honor, I have in mind that this gentleman was in a special fiduciary capacity; he was a director of a national bank. As a director he was not dealing at arm's length with the Comptroller but as a director of a national bank. He was under the same obligation that any other

(Testimony of S. James Tuffree.)

director or officer of the bank would be, having the destinies of the bank in its hands and being in relationship constantly with the bank examiner and with the Comptroller's office, to make clear disclosure to the Comptroller of matters which vitally affected the capital of the bank. And for this reason, may it please the court, where a loan is made of money to the bank with a string attached to it, or a condition of any sort, we all know that that is a liability of the bank which must ultimately be paid. It is only in the event that it is a voluntary contribution that it meets the requirements of the Comptroller's office that the capital be so much and unimpaired and maintained at that same unimpairment. If these are loans or advancements or obligations of the bank, you see, they do not meet the requirement that there be a source, an aggregate, a reservoir of money called "the capital" which is available to pay creditors doing business with the bank. And our position is that every director is in such a fiduciary capacity that he must [46] not permit the Comptroller's office, if the Comptroller asks a specific question, sets forth conditions and so on—must not permit him or lull him into a sense of security that the bank has been repaired as to impaired capital when, in point of fact, the Comptroller would consider that it had not been. And that is why I asked that question.

(Testimony of S. James Tuffree.)

Mr. Montgomery: The president has already advised the Comptroller on September 8th the following stockholders purchased the depreciation, with the understanding that the bonds were to be held or exchanged with a view of the same liquidating the amounts subscribed.

Mr. Dockweiler: Yes.

Mr. Montgomery: I do not think it is incumbent upon us to go any further. We have already told what our position was.

Mr. Dockweiler: And then you have that subsequent reply, stating clearly what the Comptroller's office would regard as only a sufficient and adequate —what they would call "contribution" to repair the impaired capital; and I am asking now whether—we get along into November—whether he ever did anything to make it clear that these gentlemen were not making a voluntary contribution without expectation of reimbursement.

Mr. Chipkin: May I add something there? This gentleman is a party plaintiff, and certainly he, himself, must have shown that he requested the money back or that he did not [47] approve that conduct of the directors in not calling attention of the Comptroller to the fact that he did not approve of that kind of an arrangement.

The Court: I will allow him to answer, with the exception noted to the ruling.

(Testimony of S. James Tuffree.)

The Witness: The question?

Mr. Dockweiler: Read the question.

(Question read by the reporter.)

A. Not in a personal way; no.

Q. Well——

A. Other than in letters that had been written by the officers of the bank to acquaint the Comptroller's office with our views with regard to that matter.

Q. Yes. Now, you had been a number of times, of course, advised by the Comptroller's representative, the bank examiner, that unless the capital of the bank were kept in good condition and unimpaired the bank would have to be closed?

A. That depends upon what examiner you are referring to there.

Q. I am referring to, we will say, Mr. Lamm, for one. Did he not tell you on a number of occasions that the capital always had to be unimpaired, else the Comptroller would appoint a receiver for the bank and liquidate it?

A. He told us at this specific time when the bond depreciation had occurred that the impairment of the capital [48] at that time would have to be taken care of, and told us how, in his opinion, how we could take care of it.

Q. Did he ever say that that was the opinion of the Comptroller of Currency of the United States?

A. Well, he was working for or out of the Comptroller's office, and we assumed that he knew

(Testimony of S. James Tuffree.)

what he was talking about; and it was at his suggestion that we took care of the depreciation in that way.

Q. Yes. Did you ever ask him whether that was the way that would be satisfactory to the Comptroller?

A. No; I did not.

Q. After these letters were received from the Comptroller which indicate that the Comptroller would regard as satisfactory only voluntary contributions made without expectation of reimbursement, did you ever go back to the examiner to find out whether—or to say "we did not make these voluntarily and without expectation of reimbursement. We expect reimbursement, and is that all right"?

[49]

A. No. I figured that we had paid our loan to the bank in good faith, just the same as any other person with capital from the outside would make in order to take care of an impairment.

Q. And these letters from the Comptroller never disturbed you in that belief?

A. They certainly did disturb all of us, as far as that was concerned, but we received these letters after the horse was out.

Q. Did you ever try to unravel that and put yourself back in status quo as you were prior to June, 1931?

A. Well, as I recall, after this had happened things started to happen in the banking world very fast. We had a holiday that averted a run on the

(Testimony of S. James Tuffree.)

bank down there, and I think I and one other director stayed down there for a whole day and we averted that run on the bank; and then after that the bank holiday was called, and I do not see how the directors or anyone else could have any control over a bank after it had been authorized closed.

Q. Now, Mr. Tuffree, isn't it a fact that this bank was not taken over by the Comptroller of the Currency for two and one-half years after this contribution was made—more than two and one-half years, as a fact? Wasn't it taken over in early 1934?

A. I think, as I recall, it was first put in the hands of a conservator. [50]

Q. Now, the conservator was Mr. Dolan himself, was it not?

A. Yes, sir. But as a conservator he was not responsible to us as directors.

Q. Do you recall the date when it was put in his hands as conservator? A. No; I don't.

Q. You don't recall whether it was March, 1933?

A. No, sir.

Q. Do you recall this contribution, as I would phrase it, or advancement, whatever it is—the money paid under this arrangement for purchase of the bond depreciation that was paid by most of the gentlemen subscribing some time in the summer of 1931, was it not? A. I imagine so. I——

Q. The Bank——

(Testimony of S. James Tuffree.)

A. This being a long time ago, I can't recall these dates definitely.

Q. These minutes we have been reading from all refer to that transaction as of in the summer and early autumn of 1931? A. Yes.

Q. So, assuming that they reflect the time, then you would say the contributions or the payments were made in the summer of 1931, most of them?

A. I presume so. [51]

Q. Now, the bank ran all during the rest of the year 1931 without being closed down by the Comptroller, did it not? A. I think so.

Q. And ran all during the year 1932 without being closed down by the Comptroller or Receiver, did it not? A. I think so.

Q. It ran during the early part of 1933 up until March without being taken over by the Comptroller or the Receiver appointed?

A. Yes; and it was periodically examined by the department and we thought that we were going to come out all right. If we had not thought so, why, we certainly would not have wanted to make the loan to an institution that we thought we would never get our money back out of it.

Q. You were a stockholder in this bank, of course? A. Yes, sir.

Q. And director of the bank? A. Yes, sir.

Q. Did you hold any other office in the bank?

A. No, sir.

Q. You were interested in keeping the bank open, of course? A. Yes, sir.

(Testimony of S. James Tuffree.)

Q. And these sums of money were raised for the purpose of keeping open the bank and not having the Comptroller [52] close it down or take it over or administer it through a Receiver, is that not the fact?

Mr. Montgomery: Now, may I have that question again?

(Question read by the reporter.)

A. That was the purpose, as I remember it.

Q. By Mr. Dockweiler: That was the purpose. And that purpose certainly was accomplished for pretty near two years, was it not?

A. I would say approximately.

Q. And, as a matter of fact, if you consider the operation of the bank under the conservator subsequent to the banking holiday in March, 1933, up until it was actually taken over by a Receiver in early 1934, the bank operated over two and one-half years after arrangement was made for sums of money to be in the aggregate $115,000, roughly, placed in the till and from which the capital impairment was corrected?

Mr. Montgomery: We object to the computation of counsel as being incorrect. This purchase of the bond depreciation was made in June, 1931, and it went into the conservator's hands two years later.

Mr. Dockweiler: Yes, 1933; March, 1933.

Mr. Montgomery: March, '33, and then into the Receiver's hands in January, 1934.

Mr. Dockweiler: Yes.

(Testimony of S. James Tuffree.)

Q. Now, during all of that time between June of 1931 [53] and January of 1934 without being taken over by the Comptroller except for the appointment of a conservator after the bank holiday in 1933, excepting the time it was taken over by the conservator, and that was not until March of 1933? A. Approximately so; yes, sir.

Q. During all of that time you never sought to unravel what might have been a misunderstanding as to the terms under which such a contribution could be made? A. No; I did not.

Q. Did you ever examine any of the financial statements of the bank subsequent to June, 1931?

A. Yes; we looked them over.

Q. All right. Did you ever list as a liability of the bank this purchase of the bond depreciation? Was that ever reflected anywhere?

Mr. Montgomery: I object to that as not the best evidence. The books would show what the——

Mr. Dockweiler: Well, he was an officer of the bank. He was a director, your Honor.

The Court: He can answer in so far as he knows.

Mr. Dockweiler: Yes.

The Court: Of course, the records are the best evidence. If he has any actual knowledge he may state it. If he has not, it will have to be proven.

Mr. Dockweiler: Yes. [54]

A. No; I don't know that that was listed as a liability.

(Testimony of S. James Tuffree.)

Q. But the cash that had been raised through that June, 1931, arrangement was put to assets, was it not?

Mr. Montgomery: I did not catch the last there.

Mr. Dockweiler: The cash that was raised pursuant to the June, 1931, arrangement was placed among the assets. In other words, it repaired the impaired capital, did it not?

A. It repaired the bond depreciation; yes, sir.

Q. Yes; it repaired what you call the bond depreciation? A. Yes, sir.

Q. And you gentlemen knew that the result of that was to put you on, we will say, an even keel, so as to show financially the bank was again in good condition and that its capital was not depreciated?

A. Put it in a good condition in this way: That as far as the bank—as the directors, themselves, that had made those contributions, and stockholders were concerned, it would satisfy that banking department; at least, that is what we thought that it would do because we were led to believe that that was the case by Mr. Lamm.

Q. Did you think the banking department was still satisfied when you were getting these letters as directors of the bank that any contributions must be voluntary and without expectation of reimbursement?

A. That was too late to help us out, as far as that [55] goes. We had made that loan in what I thought was good faith.

(Testimony of S. James Tuffree.)

Q. As a matter of fact, do you know whether there was ever any appreciation in the bond account? That was what you thought you were buying, was it not?

A. We have never been able to—I have never had, personally, a list of the bonds. That was all turned over to the conservator, and subsequent to the conservator to the Receiver. He has the bonds, I presume.

Mr. Dockweiler: Well, thank you. That is all the cross examination.

Redirect Examination

Q. By Mr. Montgomery: Was that your only purpose in paying this money into the bank, to keep the bank open? A. You mean this——

Q. You paid in $3,500, didn't you?

A. That is right.

Q. Was your only purpose in paying in the $3,500 to keep the bank open?

A. To keep the bank open; yes, sir.

Q. And what did you expect to get out of it?

A. Oh, we expected to get—if the bank was permitted—we certainly would never get anything out of it if the bank was closed, and the only way it would be possible for us to obtain reimbursement would be by the appreciation of the [56] bonds; and we felt, as afterwards turned out, that the bonds would appreciate in value and by that appre-

(Testimony of William A. Dolan.)

ciation in value, if the bank were permitted to stay open, we would get our money back.

Mr. Montgomery: That is all. Mr. William Dolan. [57]

WILLIAM A. DOLAN,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. William A. Dolan.

Direct Examination

Q. By Mr. Montgomery: What is your business or occupation, Mr. Dolan?

A. I am a real estate salesman now.

Q. In 1931 what was your business or occupation?

A. In 1931, president of the Anaheim First National Bank.

Q. How long had you been president of it?

A. I was president from 1917 until 1927. I sold out and then I bought the bank back in 1929, until the bank was closed.

Q. And became president in 1929?

A. 1929.

Q. And were you the conservator that was appointed in 1933?

A. Yes. I was conservator from March 27, 1933, until the 15th of January, 1934.

(Testimony of William A. Dolan.)

Q. And at that time you turned over all the assets to the Receiver? [58]

A. To the Receiver; yes.

Q. Did you have anything to do with the negotiations which resulted in the purchase of this bond depreciation? A. I did.

Q. Did you pay some moneys in yourself?

A. Yes.

Q. How much did you pay?

A. I paid in $32,500.

Q. Was that a cash payment? A. It was.

Q. And made at what time?

A. I don't remember the date. It was in——

Q. Was it at the time of the appointment of the committee or subsequent? The committee was appointed September 18, 1931.

A. It was appointed when?

Mr. Montgomery: June 18th. Did I say "September"?

The Reporter: Yes, sir; "September 18th."

Mr. Montgomery: Pardon me. June 18, 1931.

A. Yes; it was subsequent to that time, a short time after.

Q. I notice in Defendants' Exhibit B of September 8, 1931, "William A. Dolan—cash $32,500.00." Are you the William Dolan referred to in that? A. Yes.

Q. And are you the one that wrote that letter? [59]

A. Yes.

(Testimony of William A. Dolan.)

Q. Now, will you state what the negotiations were that resulted in the furnishing of this money?

A. Well, prior to the time of raising this amount at the suggestion or recommendation of Lamm who was at that time the National Bank Examiner, we were informed that we could purchase the depreciation in our bond account which was impaired to a considerable amount at that time. Mr. Lamm had informed me and also the board of directors at that time that this had been done at another bank of which he had charge, and he felt very sure that we would be able to get our money back under that condition and plan which he outlined, and the money was put up by all the subscribers thereto with that understanding, and they all felt that if the bonds would appreciate above the price—above the market price at that time there would be no question about them getting their money back. Then later on, when the Comptroller advised us that we had to treat the amount put up as a voluntary contribution it was too late to do anything; the money had been paid in the bank, and we informed the Comptroller the condition under which the money had been put up.

Q. Did you talk to any other bank examiner before purchasing this depreciation, and explain the situation to him?

A. No; I did not—I think that later on, after the [60] money had been put up, Mr. Waldron was the successor of Mr. Lamm in our territory, and I

(Testimony of William A. Dolan.)

told him what we had done; and the records show that Mr. Waldron approved our action. That was the understanding of the way the information was given to the Comptroller's office.

Q. Do you recall the first meeting was June 18, 1931, at which you were present? I will show you that first, the minutes of that first meeting or that meeting. Let us look at the minutes themselves.

A. Yes.

Q. Now, was a committee appointed?

A. Yes.

Q. And had you discussed the matter with Examiner Waldron prior to that time? A. Yes.

Q. Do you recall about when it was you discussed the matter with Bank Examiner Waldron?

A. No.

Q. Was it before your meeting of June 18th or afterwards? A. It was afterwards.

Q. And do you know who was present when you discussed the matter with Mr. Waldron?

A. The board of directors were present, a quorum of them were present. I don't remember their names.

Q. Let me put it this way: Was your discussion with [61] Mr. Waldron, the Bank Examiner, prior to making actual collections?

A. Prior to the time that we collected the——

Q. That you collected the money that was to purchase this bond depreciation?

A. I think so.

(Testimony of William A. Dolan.)

Q. Now, what was said at the discussion with Mr. Waldron?

A. My recollection is that we discussed the plan as heretofore given, and that Mr. Waldron informed us that he thought it would work out all right, providing the bonds, the depreciation (appreciation) in the bonds increased. Of course, we all understood that that was where we were to get our money.

Q. You said the "depreciation of the bonds increased." Do you mean that it became of less or greater value?

A. I mean the depreciation decreased.

Mr. Montgomery: Does your Honor want to suspend now? It is 12 o'clock.

The Court: I think so. 2:00 o'clock, gentlemen.

(Whereupon an adjournment was taken until 2:00 o'clock p. m. of this day.) [62]

Afternoon Session

2:00 o'Clock

Mr. Montgomery: Mr. Dolan, will you take the stand? I would like leave, your Honor, when Mr. Lamm comes, if it is agreeable to counsel—he said he would be in at 2:30—if I may withdraw the witness and put him on.

The Court: Oh, yes.

(Testimony of William A. Dolan.)

WILLIAM A. DOLAN,

recalled.

Q. By Mr. Montgomery: Now, Mr. Dolan, I was asking you before luncheon as to having had some talk with the National Bank Examiner Waldron. During the noon hour have you refreshed your recollection as to the date that you had this conversation with Waldron? A. Yes; I have

Q. And when was that?

A. Why, we were examined July the 22nd, 1931

Q. Was that June or July?

A. Or June, I mean. June 22, 1931.

Q. That was before the July meeting——

A. Yes.

Q. —at which this $175 a share was finally arranged? A. Yes. [63]

Mr. Montgomery: I have forgotten, your Honor whether I had him state the substance of that conversation or not. Do your Honor's notes show there?

The Court: He said: "He informed me he thought it would work out all right; after he told me I discussed it with Waldron after June, '31 Directors were present."

Q. By Mr. Montgomery: What did you tell Mr Waldron the plan was?

A. I told him that Mr. Lamm had suggested that the directors and some of the stockholders purchase the bond depreciation and if the bonds ap

(Testimony of William A. Dolan.)

preciated, why, we were to be able to get our money back; and Mr. Waldron seemed to think that that was O.K. He said——

Q. Not what he seemed to think. What did he say?

A. He said he did not see why it would not work out all right; and he said to go ahead, and on the —I think it was June the 22nd, I wrote the Comptroller of the Currency to that effect.

Mr. Dockweiler: Just a minute. May I get the date of that, Mr. Reporter?

(Last part of answer read by the reporter.)

Q. By Mr. Montgomery: Well, are you referring to your letter attached to the minutes?

A. Yes.

Q. Attached to the minutes of the 18th day of June, 1931, is a letter from Mr. Gough, Deputy Comptroller, [64] dated June 19, 1931, and your answer is dated June 26, 1931. Is that the letter that you refer to?

A. Yes; that is the letter.

Mr. Montgomery: That refers to: "Will also state that we were examined by National Bank Examiner, Waldron on June 22nd, 1931, and he recommended and approved the above plan." Do you have a copy of this letter, counsel, or shall I read the rest of it in?

Mr. Dockweiler: What is the date of that letter?

Mr. Montgomery: June 26, 1931.

(Testimony of William A. Dolan.)

Mr. Dockweiler: June 26th. I have a copy o that and it will be stipulated, so far as the defend ant is concerned, that may be used in lieu of read ing into the evidence and otherwise presenting th exhibit.

Mr. Montgomery: We will offer that as the nex number.

The Clerk: Plaintiff's Exhibit 3.

PLAINTIFF'S EXHIBIT No. 3.

June 26, 1931.

Mr. E. H. Gough,
Deputy Comptroller,
Washington, D. C.

Dear Sir:

Replying to your letter of June 19, 1931, regard ing proposed increase in the bank's capital stock will say that we have decided not to increase th stock at this time. Under date of June 18, 1931 at a meeting of the directors of the bank, it wa agreed that the directors and other stockholder would cover the depreciation in the bond account and raise the amount necessary for this purpose a once.

Will also state that we were examined by Nationa Bank Examiner Waldron on June 22nd, 1931, and he recommended and approved the above plan.

We will notify you as soon as the amount neces sary to cover the depreciation in the bond accoun has been raised.

(Testimony of William A. Dolan.)

Trusting that this is satisfactory and meets with your approval, we remain

Very truly yours,

President.

WAD:ML

Q. By Mr. Montgomery: Who was M. Del Giorgio?

A. Mr. Del Giorgio was one of our stockholders and depositors.

Q. Did you have any conversation with him whereby you obtained his subscription?

A. Yes.

Q. Do you know who else was present?

A. I think Mr. Tuffree was present.

Q. Did you have a written form of subscription?

A. Yes. [65]

Mr. Montgomery: Have you the original of that, may I inquire of counsel, your Honor, or may we use this?

Mr. Dockweiler: I will stipulate that the wording on the original——we have the original here. I don't know whether you want to introduce the original or merely a copy. The original has the signatures.

Mr. Montgomery: Well, if it is stipulated——

Mr. Dockweiler: But they are similar.

Mr. Montgomery: If it is stipulated these are the actual signatures——

(Testimony of William A. Dolan.)

Q. Now, for instance, "M. Del Giorgio," is that Mr. Del Giorgio's signature?

A. Yes, sir; Mr. Del Gi*r*ogio.

Q. Do you recognize the other signatures on the original here? A. I do.

Mr. Montgomery: Then let us introduce the copy.

Mr. Dockweiler: We will stipulate that the signatures are the signatures of the parties purporting to sign; and I would suggest that it might be more convenient if we were to introduce the copy into evidence.

Mr. Montgomery: Yes. That is what I am going to do now. I will introduce the copy of the original which has just been exhibited.

The Clerk: Exhibit 4.

Mr. Dockweiler: That would be Plaintiffs' 4? [66]

The Clerk: 4 is right.

PLAINTIFFS' EXHIBIT No. 4.

In compliance with action of the Board of Directors taken at a meeting held June 18, 1931, recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned, the undersigned hereby subscribe to such fund in the amount set opposite our names.

It is the intention that interest received from bonds equaling the amount of depreciation purchased be set aside for the use of the undersigned.

(Testimony of William A. Dolan.)

An appraisal of the bond list shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro-rata among the stockholders purchasing depreciation in bond account.

						11-22-32 n
Wm. A. Dolan		Pd	$32500-	D. A. Woodward		$1225.00
					10/28-32 n	
F. H. Dolan		Pd	32500-	J. W. Truxaw		1750.00
	6-4-3				n	Pd
Ben Baxter	8500	Pd	1750-	J. J. Dwyer		1750-
	RE-					115650-
			Date of Note			
L. J. Kelly		Pd	4900- 10/10-32 n			
Ernest F. Ganahl		Pd	1750.00 10-7-32 n			
			n			
Frank Baum		Pd	5250- 9-19-32			
			n			
J. W. Brunworth			5250- 10-6-32			
			n3m			
S. James Tuffree		Pd	3500. 9/29-32			
			n			
Ed Kelly			9000- 10-7-32			
Fred & Sophie Rimpau		Pd	Pd 3675-			
F. A. Yungbluth			1750/00 11-23-32			

(Testimony of William A. Dolan.)

F. K. Day	Pd	n 875	10/8-32
Minnie Baxter	Pd	Pd 850 3000 ~~3850~~	7-8-32
M. Del Giorgio	Pd	n 875=	12-14-32
Jennie Pomeroy (M. B.)		Pd 2000- ~~3500~~ 1500	7-11-32

Q. By Mr. Montgomery: Yours is the first signature on that list, isn't it, $32,500?

A. Yes, sir.

Q. Did you pay cash? A. Yes, sir.

Q. "F. H. Dolan," is that your brother?

A. Yes.

Q. He also paid cash? A. Yes.

Mr. Montgomery: Just a moment, your Honor. Cross-examine.

Cross Examination

Q. By Mr. Dockweiler: Mr. Dolan, you were the president of the bank, and the president of the bank during all of the matters that we have testified to, namely, since—or that have been referred to in the course of the examining of Mr. Tuffree, beginning with about 1930, is that right?

A. That is right.

Q. And you had previously been president of the bank before it was sold out, and then you re-

(Testimony of William A. Dolan.)

sumed being president of the bank after it was taken over by your interests again?

A. That is true.

Q. Now, you say that you were under the impression [67] that you and the other subscribers were buying what you call a depreciation of the bank account? A. Yes.

Q. Is that right? A. Yes.

Q. Do you recall that you had dealings with the Comptroller's office prior to June, 1931, with reference to making up impaired capital of the bank?

A. Yes.

Q. And those dealings or negotiations included, I take it, correspondence with the Comptroller's office? A. Yes.

Q. Now, I will ask you for the purposes of refreshing your recollection to note the minutes of the directors' meeting of July 16, 1930, about a year before this arrangement that you speak of, the June arrangement for purchasing the bond depreciation, and I will ask you whether or not you were present at that meeting if you have a recollection?

A. Yes. The records show I was there.

The Court: What is the date again?

Mr. Dockweiler: July 16, 1930.

Q. And, Mr. Dolan, at that meeting was there read——can you ascertain by refreshing your memory in respect to the minutes and in respect to what purports to be a letter from the Treasury Department and a copy of your reply, whether or not

(Testimony of William A. Dolan.)

there was a letter read to that meeting from [68] the Treasury Department, addressed to the board of directors of the Anaheim First National Bank, dated July 2, 1930?

A. Yes; the records show that.

Mr. Montgomery: Now, just—that is merely preliminary?

Q. By Mr. Dockweiler: And whether you expressed it——

Mr. Montgomery: I would like to have counsel state what the purpose of this examination is and what item we are going into, because this is long prior to the transaction in question.

Mr. Dockweiler: Well, showing, your Honor, that the gentleman knew long prior—a year prior, from the records themselves, that an impaired capital could only be corrected in one of several ways specifically set forth in this very letter that I am about to introduce.

Mr. Montgomery: This party is not a plaintiff.

Mr. Dockweiler: But he has testified on behalf of the contributors, or whatever you wish to call the gentlemen who signed this agreement, and he says that that was their understanding.

The Court: That letter is addressed to whom?

Mr. Dockweiler: "Board of Directors, Anaheim National Bank."

The Court: Objection overruled and exception noted.

(Testimony of William A. Dolan.)

Q. By Mr. Dockweiler: As I understand your testimony, Mr. Dolan, it was that such a letter had been read to the [69] board?

A. Nothing in there—yes; there is, too. Impairment of capital was caused by the depreciation in the bond account.

Q. Well, I want as a preliminary question to ask whether or not that letter was read to the board?

A. Oh, yes. The record shows that.

Q. And whether or not at the same meeting you, as president of the bank, were instructed to make a reply to the Comptroller's office, and in that connection I would invite your attention to the last paragraph of the minutes.

A. "Letter from the Treasury Department addressed to the Board of Directors of Anaheim First National Bank, dated July 2, 1930, was read and president instructed to reply to this letter, copy of which reply is being"——

Mr. Montgomery: I think, your Honor, in order that your Honor may get this with an understanding in mind, that counsel shall state what the whole transaction was there, because it was a different transaction than this particular one.

Mr. Dockweiler: Well, but it was the general question of repairing the impaired financial structure of the bank, your Honor. Whether there was—

The Court: You have stated the letter was of

(Testimony of William A. Dolan.)

information as to certain ways only in which it could be repaired.

Mr. Montgomery: No. They already had put up certain notes. There was a transaction already pending. [70]

Mr. Dockweiler: And we say, your Honor, it would show the state of mind of the witness.

The Court: Yes; let the witness explain it. He is well posted.

Mr. Dockweiler: Yes.

Q. And that is the copy of the letter in reply, Mr. Dolan—— A. Yes.

Q. ——that is attached to the minutes, dated July 17, 1930, addressed to E. H. Gough, Deputy Comptroller, and I assume was signed by yourself as president? A. Yes.

Q. I see there is no imprint of your signature?

A. No. That is just a copy of the letter.

Q. But that is the letter which you sent as president? A. Yes, sir.

Mr. Dockweiler: At this time defendant introduces as defendants' exhibit——

The Clerk: F.

Mr. Dockweiler: ——F, a copy of this same letter of July 2, 1930, addressed by E. H. Gough, Deputy Comptroller, to Board of Directors, Anaheim First National Bank; and I will ask opposing counsel whether it will be agreeable to introduce the copy.

(Testimony of William A. Dolan.)

Mr. Montgomery: It is agreeable to introduce the copy, and we will make the objection that it relates to an entirely [71] different transaction and has no bearing upon the issues of this case, immaterial and irrelevant.

The Court: The objection will be saved and exception noted, and we will see what we make out of it.

DEFENDANT'S EXHIBIT F

Copy

Tr-NKW-12 S-10228

(Seal)

Comptroller of the Currency Treasury Department

Washington

Address reply to July 2, 1930

"Comptroller of the Currency"

Board of Directors,

Anaheim National Bank,

Anaheim, California.

Dear Sirs:

Receipt is acknowledged of the President's letter of June 11, advising that a contribution of $30,000 has been made by certain stockholders and that that amount, together with $10,000 from undivided profits, has been set up as a reserve against the depreciation in your bond account which, according to a recent appraisal, is said to amount to $39,076.

The report of an examination of the bank, com-

(Testimony of William A. Dolan.)

pleted on February 7 by National Bank Examiner R. Foster Lamm, showed depreciation of $59,991.88. It would appear, therefore, that between the date of Mr. Lamm's examination and the date the President's letter was written there was an increase of approximately $20,000 in the value of the securities owned by the bank. The depreciation shown in the examiner's report, when other losses of nominal amount were considered, showed an impairment of the bank's capital of $39,523.54. If the market value of the securities has increased by $20,000, the impairment of capital has as a result been reduced to approximately $20,000 and the contribution of $30,000 referred to in the President's letter of June 11 was sufficient if properly made to provide for the remaining impairment and in addition furnish undivided profits of approximately $10,000.

From the resolution, a copy of which was incorporated in the President's letter, it does not appear that the contribution was made under such terms and conditions as to provide for the impairment. It appears on the contrary that those who supplied the funds for the "contribution" are to be reimbursed out of the earnings of the bank. If the understanding is that the "contributors" are to be reimbursed by the bank, there has merely been a substitution of sound assets for losses and a corresponding increase in liabilities so that the difference between the value of sound assets and the amount of

(Testimony of William A. Dolan.)

liabilities is not different from what it was before the funds were paid into the bank. It is then the position of this office that the impairment of capital, shown in the examiner's report, still exists with such changes as may be warranted by changes in the values of assets.

An impaired capital may be restored in the manner prescribed by Section 5205 involving an assessment of the stock. If restoration of the capital in the manner provided by that section is not desired, restoration may be accomplished through voluntary and unconditional contributions to the bank, or by the purchase for cash of the assets estimated by the examiner as losses. Contributions of cash or purchases of assets to eliminate an impairment of capital must, however, be unconditional and there must be no obligation on the part of the bank to repay the contribution or to repurchase the assets should they prove uncollectible.

If in your case the impairment is provided for by voluntary and unconditional contributions, or by purchase of the assets classified as losses, and the contributions are made or the assets purchased by only a part of the shareholders, it is not unreasonable that the latter expect reimbursement in proportion to their holdings from shareholders who have not contributed. Any arrangement involving future payments by stockholders who do not contribute, must, however, be made with the non-con-

(Testimony of William A. Dolan.)

tributing stockholders, themselves, and not with the bank.

You are advised, therefore, that unless advice is received shortly that the "'contributions" referred to in the President's letter of June 11 have been voluntarily made without any conditions whatever as to repayment by the bank, the losses shown in the examiner's report will not be regarded as having been provided for.

A reply to this letter is requested at an early date, forwarding copies of your communication to Chief National Bank Examiner T. E. Harris, 1103 Alexander Building, San Francisco, California, and to National Bank Examiner R. Foster Lamm, 1124 North Olive Street, Santa Ana, California.

Yours very truly,

(Signed) E. H. GOUGH

Deputy Comptroller

Mr. Dockweiler: Defendant introduces as Defendants' Exhibit G the reply of Mr. W. A. Dolan, as president of the bank, to E. H. Gough, Deputy Comptroller, under date of July 17, 1930; and I will ask opposing counsel whether it will be stipulated that the copy may be introduced in evidence.

(Testimony of William A. Dolan.)

DEFENDANT'S EXHIBIT G

Copy

July 17, 1930

Mr. E. H. Gough, Deputy Comptroller,
Treasury Dept.,
Washington, D. C.

Dear Sir:

Your favor of July 2, 1930, addressed to the Board of Directors of the Anaheim National Bank, was received.

In reply to your letter will say that under date of July 16, 1930, the following agreement was signed by the stockholders of this bank who contributed the sum of $30,000, which amount was placed in a reserve account for depreciation of bonds:

The undersigned stockholders of the Anaheim National Bank, having contributed the sum of $30,000, which amount was placed in a reserve account with said bank for the purpose of covering a partial depreciation in the Bond Account of said Bank, have made said contribution with the understanding that we have purchased the depreciation in the Bond Account and do not hold the bank responsible for repayment of above amount.

We are mailing a copy of this letter to T. E. Harris, Chief National Bank Examiner, San Francisco, and also, a copy to National Bank Examiner, R. Foster Lamm, at Santa Ana, California.

(Testimony of William A. Dolan.)

Trusting that our action in this matter will now be satisfactory and meet with the approval of your office, I remain.

Yours respectfully,

President

WAD/DB

Mr. Montgomery: Yes; on the same basis as the other letter. Now, Mr. Lamm is here. May we interrupt the proceedings and call Mr. Lamm?

The Court: Yes. [72]

R. FOSTER LAMM,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. R. Foster Lamm, L-a-m-m.

Direct Examination

Q. By Mr. Montgomery: Mr. Lamm, in 1930 and 1931 what was your business or occupation?

A. Until September, 1931, I was a National Bank Examiner.

Q. And as such National Bank Examiner did you have anything to do with the First National Bank of Anaheim with respect to an impairment of their capital?

(Testimony of R. Foster Lamm.)

A. Not in 1930, I don't think.

Q. In 1931, then?

A. Not in 1931. It probably would be in 1928 or '29, as I recollect.

Mr. Montgomery: If I may have just a moment here, your Honor.

Q. May I show you, Mr. Lamm, the letter which has just been introduced in evidence of July 2, 1930, and ask you if you will refresh your recollection by reading that letter? And then there is an earlier one also, in April.

Mr. Dockweiler: Mr. Montgomery, may I ask from what minutes is he reading now? [73]

Mr. Montgomery: He is reading that last letter that you put in.

Mr. Dockweiler: 1930.

Mr. Montgomery: 1930.

A. My last examination of the bank must have been February the 7th, 1930.

Q. Were the dealings that you had then with the bank relating to this impairment of capital on or about that time? A. It must have been.

Q. Do you recall their putting up $30,000 of notes?

A. I do not recall the exact amount; no.

Q. Well, do you recall, the transaction that is referred to in the letter there, or there being such a transaction?

A. Judge, I don't recall this transaction. I will tell you why if you want to know.

(Testimony of R. Foster Lamm.)

Q. Yes.

A. I left the district, you see, did not go back after my examination, if I remember correctly.

Q. I see. But you do recall——

A. I recall the original transaction; yes.

Q. Now, that is what I am getting at.

A. But not these particular notes.

Q. Some time in 1930, then? A. Yes, sir.

[74]

Q. You took up with the board of directors the matter of making up the deficiency?

A. At the time of the examination; yes, sir.

Q. Now, what did you tell them at that time as to a method by which they could handle the matter?

Q. By the Court: You mean the examination of February 7, 1930, which you said was your last one?

A. Yes, sir. As I recollect the whole thing, we held a board meeting, called a board meeting following the completion of the examination. What the figures were of the losses I don't remember. We discussed ways and means to restore the capital impairment. We discussed the possible effect of an assessment, and finally talked about a contribution. The question was raised at that time, if the directors contributed money to the bank would there be any chance of them getting it back again. We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation of the bond account. That would

(Testimony of R. Foster Lamm.)

give them a possibility of return of the money that they put in the surplus account or undivided profit account.

Q. By Mr. Montgomery: And when you spoke of "buying the depreciation" was that a phrase that you coined, or is that common?

A. Well, "buying the depreciation" was something new. You could always restore the capital of a bank by buying its bad assets. [75]

Q. Have you anything further you could add, or is that all you recall of the transaction?

A. I think that was agreed to and I left them to raise the money.

Mr. Montgomery: Cross-examine.

Cross Examination

Q. By Mr. Dockweiler: Mr. Lamm?

A. Yes, sir.

Q. How long had you been a bank examiner in the year 1930 at the time that you examined for the last time this Anaheim First National Bank?

A. I went in the service in 1921, I believe it was.

Q. 1921. And you say you attended a directors' meeting in early 1930 after your examination of February of 1930, at which the formula for repairing the impaired capital was discussed, is that right? A. Yes, sir.

Q. Now, do I understand that the last examination that you made of this bank was in 1930?

A. Well, I think it was.

(Testimony of R. Foster Lamm.)

Q. Well, so far as you can recall, it was this February, 1930? A. Yes.

Q. So your discussions with the gentlemen who are either officers or members of the board of directors of the [76] bank were discussions with reference to repairing the impaired capital as it stood following your examination in February of 1930?

A. That would be right.

Q. Yes, sir. You were not consulted, of course, with reference to any further repair of the impaired capital in June, 1931, were you?

A. No; I don't—no; I could not.

Q. As a matter of fact, had Mr. Waldron succeeded you as Examiner for that district?

A. Yes, sir.

Q. Probably some time in 1930?

A. It seems to me it was along in the fall of 1930 I left the district, maybe early summer.

Q. For the purpose of refreshing your recollection, I will show you what has been introduced into evidence here merely by copy, but for the purpose of refreshing your recollection probably you could do better with the original. This is the original of what has been introduced into evidence as Plaintiffs' Exhibit No. 4. And I will ask you whether or not that document was ever exhibited to you or your advice asked upon it? And, for the purposes of your testimony, I will state what I understand to be the substance of the evidence, namely, that that is the arrangement which, in June, 1931, was en-

(Testimony of R. Foster Lamm.)

tered into between these various contributors for raising about $115,000 to [77] repair the impaired capital.

A. Mr. Dockweiler, I don't think I was there in June, 1930.

Q. But this particular Exhibit No. 4 was never referred to you for your advice or consultation afterwards? A. Not to my recollection.

Q. Not to your recollection. So your transactions with the bank, so far as Examiner was concerned, were terminated some time in 1930, and the best that you can figure at this time is in the spring of 1930?

A. Let me see; June, 1930. I think I left the district along in the middle of 1930.

Q. Yes. By the way, I show you for the purpose of fixing a time in your mind when you discontinued your examination of this bank in the capacity of Examiner for the district—I show you the original copy which has been introduced as Defendant's Exhibit F, being a letter dated July 2, 1930, from the Deputy Comptroller to the Board of Directors of the bank. Was that ever discussed with you by Mr. Dolan as president, or any other officer or director of the bank?

A. Mr. Dockweiler, I could not remember whether it was or not. It might have been possible I received copies of this letter, and it might have been Mr. Dolan came over there to Santa Ana or I went over to Fullerton or Anaheim and talked it over. [78]

(Testimony of R. Foster Lamm.)

Q. Do you think your mind would be refreshed if you would read, say, the fourth paragraph of that letter and the fifth paragraph?

A. No. That brings back no recollection. Those are more or less stereotyped paragraphs.

Q. Stereotyped. In other words, they represent the policy—— A. Of the department.

Q. —of the Comptroller's office; and would you, if you wanted to state the policy of the Comptroller's office, find it reflected in the words in paragraph 4 of this July 2, 1930, letter?

Mr. Montgomery: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained to that.

Q. By Mr. Dockweiler: But that paragraph, as you say, does represent the policy, a stereotyped expression? A. Yes, sir.

Mr. Montgomery: We make the same objection. It is the same question.

Mr. Dockweiler: It is rather to minimize the examination of the gentleman, because I want to go into the point of the ways of repairing impaired capital. And if he states that that is a stereotyped expression of what would be sent to banks——

The Court: If he could state that that was the [79] general instruction or advice with which he was familiar, he may state it.

Mr. Dockweiler: Yes; using the Judge's words as my question? A. Yes, sir.

Q. Now, you say that it was one of the cus-

(Testimony of R. Foster Lamm.)

tomary methods of repairing impaired capital for anyone interested in the bank, like stockholders or directors or officers, buying bad assets?

A. That is correct.

Q. Yes. Now, in your experience as a bank examiner, commencing with 1921 and ending in 1930, I take it, at least with reference to this bank——

A. '31, I think.

Q. —'31, did it ever come to your attention that the capital, the impaired capital of a national bank was ever repaired by any such method as the method contemplated by this arrangement, namely, buying the depreciated bond account? A. Yes.

Q. In what banks?

A. First National Bank of Huntington Beach.

Q. Was that within your jurisdiction?

A. Yes, sir.

Q. Who suggested that to that national bank?

A. I think I did. [80]

Q. You did. Now, isn't it a fact, Mr. Lamm, that this is your own idea, and whatever merit or demerit attaches to it as a formula for repairing the impaired capital of a bank is your own?

A. I think maybe I claim it.

Q. You would claim it. Do you know whether or not as a matter of policy of the Treasury Department that was one of the recognized methods?

Mr. Montgomery: I object to that as calling for a conclusion of the witness.

(Testimony of R. Foster Lamm.)

The Court: No. He can state whether he has ever had the approval of the department in his written reports as to any such plan.

Q. By Mr. Dockweiler: Yes. Using the Judge's words in my question, what would your answer be?

A. Well, I would have to say that they did not disapprove it when it worked.

Q. They did not disapprove it. Did you ever specifically set it before them and ask for their approval or disapproval?

A. Only as an accomplished fact.

Q. Only as an accomplished fact, and that with reference to what?

A. First National Bank of Huntington Beach.

Q. Yes. And when was that submitted to the department? [81] A. Oh——

Q. In what year?

A. Probably 1929, I imagine.

Q. 1929. Did you ever have an answer from the Comptroller's office as to that being a proper method of repairing impaired capital?

A. I never.

Q. No answer one way or the other?

A. I do not remember that there was.

Q. How would you carry such an item in the books of the bank?

Mr. Montgomery: I object to that as not proper cross examination.

Mr. Dockweiler: If it is a question of a method, your Honor, and as to the soundness of the method, and this gentleman was a bank examiner——

(Testimony of R. Foster Lamm.)

The Court: Q. In the instance that you have given was it entered on the records of the bank?

A. Yes, sir; it had to be.

Q. By Mr. Dockweiler: How was it entered?

A. The bond was charged down and the undivided profits to the new carrying value.

Q. To its carrying value?

A. Yes, sir. That would deplete the undivided profits account first, and then your surplus, and then into the capital. Before it gets into the capital the [82] contribution goes into the undivided profit account and restores the undivided profit account. In other words, they buy the charged-off assets.

Q. But the bonds are, of course——

A. (Interrupting): Makes the recovery out of the return of the charged-off assets.

Q. But the bonds are upon the books of the bank, bonds of the bank, are they not, assets of the bank? A. Yes; at a carrying figure.

Q. At a carrying figure. How about the interest on those bonds?

A. And that is generally turned into a matter of dispute.

Q. That turns into a matter of dispute. Under your theory who would be entitled to the interest on $100,000 worth of such bonds that were upon the books of the bank and upon the statements issued to the public, as bonds?

A. Well, it could be prorated, you know. That would be easy. That is a matter of mathematics. I don't recollect we ever got into it that far.

(Testimony of R. Foster Lamm.)

Q. Suppose there appeared on the books of the bank $115,000 worth of bonds; how would you express in the bank statements that those bonds bore no interest that was payable to the bank; that the interest had been cut off and any interest and appreciation would go to third parties?

A. It would not be expressed that way. The bank [83] would be carrying the bonds at its book figure. They might be worth more and they might be worth less.

Q. In reference to this Anaheim First National Bank, did you ever during the course of your examination period suggest that method and have the gentlemen during the course of your examination period carry it out in any bond depreciation repairment that they made, that is, with reference to this particular bank?

The Witness: May I hear that question again?

Q. May I reframe my question? That looks a little complicated. At any time during your examination period of this bank was there ever this method put into practice?

A. You mean were the entries actually made?

Q. Well, was this repairing of impaired capital by buying bond depreciation of Anaheim First National Bank ever put in practice on any occasion during the period of your examining the bank?

A. Mr. Dockweiler, I do not remember because I passed on out of that picture. It was not done immediately after my examination. I have a faint

(Testimony of R. Foster Lamm.)

recollection, and I am not sure of this, of the bank getting an official notice of impairment of capital, but I am not sure about that.

Q. And, as I understand, this method is your own method and your experience in it is limited to the one bank, the First National of Newport?

A. Yes, sir. [84]

The Court: I thought you said the Huntington Beach. Did you say "the Huntington Beach"?

A. Yes, sir.

Mr. Dockweiler: That is all. No further cross examination.

Q. By the Court: Was that bank liquidated or restored?

A. That bank later merged into a state bank, if I remember correctly. At the time, this capital was restored and it operated along.

Redirect Examination

Q. By Mr. Montgomery: In order to perhaps fix a little more definitely, let me show you a letter from the Treasury Department of April 23, 1930, to Mr. William A. Dolan, president, Anaheim First National Bank, and see if that letter would refresh your recollection as to dates.

(Witness examining paper.)

Q. Now, the question is: Would it be after that letter that you gave the advice to them about restoring the impaired capital by buying the depreciation?

(Testimony of R. Foster Lamm.)

A. Judge Montgomery, I have a recollection—it may be faulty—of holding a board meeting immediately after the examination; and the date of this examination, according to the first letter, was February the 7th.

Q. Yes. And this gives the same date, I believe. [85]

A. Well, then, it would be before that letter, you see, that I held the meeting.

Q. You say this letter speaks of your examination completed on February 7th?

A. Yes, sir. It was always customary to hold your meeting immediately after you completed your examination.

Mr. Montgomery: May I just have a moment to see if there is something in the minutes here? I might say that I examined the minutes and I do not find any note of Mr. Lamm being present at a stockholders' meeting; but I do find mention of increasing the capital stock. That was the first plan, apparently. That is all.

Mr. Dockweiler: That was the first plan.

Mr. Montgomery: That was the first plan. That is all, Mr. Lamm.

Mr. Dockweiler: That is all.

Mr. Montgomery: It is agreeable that Mr. Lamm be excused?

Mr. Dockweiler: It is agreeable to us. [86]

WILLIAM A. DOLAN,

recalled.

Cross Examination resumed.

Mr. Dockweiler: Will the reporter be good enough to read the last two or three questions and answers of Mr. Dolan's cross examination, just so I can pick up the thread?

(Record read by the reported as requested.)

Mr. Dockweiler: Because we consider them important, your Honor, I would like to read those letters to your Honor for the orderly procedure; and if it is agreeable to opposing counsel, the reporter need not take them down because they are already introduced.

(Mr. Dockweiler thereupon read Defendants' Exhibits F and G.)

Mr. Montgomery: I think, your Honor, that you should have before you the resolution that is referred to in that letter, and with counsel's consent I will read it, from the meeting of the 29th day of May, 1930.

> "It was moved by J. J. Dwyer, and seconded by Fred C. Rimpau and carried, that a reserve fund be created by voluntary contribution of stockholders to offset depreciation in bond account, and that stockholders contributing will be reimbursed from said reserve fund which shall be built up by appreciation in the bond account or by any other earnings in the bank."

[87]

(Testimony of William A. Dolan.)

Mr. Dockweiler: That was prior to the sending of that letter, was it not?

Mr. Montgomery: Yes; that was prior, and it is referred to in the letter as being the basis of the contributions, so-called.

Mr. Dockweiler: Let me see; what is the date of that meeting?

Mr. Purpus: May 29, 1930.

Mr. Dockweiler: That was in 1930, a year before the arrangement of June, 1931.

Q. Now, this letter of the Comptroller's office, I take it, remained in the files of the bank and was incorporated into the minutes of the meetings of the board, that is, into the minute book itself, as we find it here in court? A. As far as I know.

Q. Are you able to tell by looking at the original of this June, 1931, arrangement which has been introduced by copy as Plaintiffs' Exhibit No. 4, when the various contributions were paid?

A. No way to tell by this.

Q. I will ask you whether or not these facts which appear after certain names, like "10-16-32, 10-7-32," and there must be 10 or 12 of them—whether that refreshes your recollection as to when the contributions were made or payments made under that arrangement?

Mr. Montgomery: Well, the pleadings, I think admit [88] the contribution. Oh, you are getting dates?

Mr. Dockweiler: Just the time, that is all.

(Testimony of William A. Dolan.)

Mr. Montgomery: Getting the dates; I get you.

A. That is when the notes were paid from these different contributions.

Q. By Mr. Dockweiler: In other words, cash was given by some contributors? A. Yes.

Q. And notes by a number of others, and you say the notes were paid in 1932, part of them would you say from that original?

A. I think so; yes.

Q. Then that would be, if I follow it——

Mr. Montgomery: Pardon me. May I make the objection that I don't think this witness knows.

Mr. Dockweiler: Well, if he does know I just want to ascertain.

A. I am not certain about those notations.

Q. You are not certain? A. No.

Q. Could you tell in whose handwriting they are? A. It looks like my handwriting.

Q. It looks like your handwriting. Well, that recalls nothing, however, to you. Isn't it a fact that there were a number who paid or made their contributions by notes and the Comptroller's office objected to the note [89] feature and insisted that the notes be paid?

A. I don't remember that. The Comptroller asked, I think—wanted to know how many notes that had been paid since the arrangement had been made and wanted a list of those that were not paid.

Mr. Montgomery: Your Honor, we are agreed to introduce the original and withdraw the copy.

(Testimony of William A. Dolan.)

The Clerk: Of Exhibit 4?

Mr. Montgomery: Of Exhibit 4. No; not 4, is it?

The Clerk: Yes; Plaintiffs' 4.

Mr. Montgomery: Oh, yes; this is Plaintiffs' 4.

Q. By Mr. Dockweiler: Mr. Dolan, you knew during all of this time that you had actually an impaired capital and that the Comptroller by repeated letters stated that contributions must be voluntary and without expectation of reimbursement, did you not?

A. That was mentioned after we purchased the bond depreciation.

Q. Now, in 1930, which was a year before you purchased the bond depreciation and which was the last time prior to June of 1931 when you had trouble with the bank—and I am referring to the trouble of 1930.

A. What trouble are you referring to?

Q. In 1930 you had to make good some impaired capital. A. Bond depreciation was all.

Q. And then you had this letter of July 2, 1930, from [90] the Comptroller's office stating just how voluntarily and without expectation of reimbursement the contributions had to be.

A. What is the question, please?

Q. Well, the question is: Didn't you during 1930 and during 1931 know that the Comptroller required that all contributions to repair impaired

(Testimony of William A. Dolan.)

capital had to be voluntary and without expectation of reimbursement?

Mr. Montgomery: I object to that as calling for a conclusion of the witness and as argumentative. We have the letters here. They speak for themselves.

The Court: Objection sustained.

Q. By Mr. Dockweiler: Now, this was a relatively small bank, I take it, a bank in Anaheim that had how many officers and clerks and operatives—probably 15? A. Something like that.

Q. 15. And no branches, of course?

A. No.

Q. And you were in direct charge in 1930, in 1931 and 1932 and up into 1933 until the Receiver took it over in 1934, in charge of that bank yourself? A. Yes.

Q. And the files were accessible to you at all times? A. Yes.

Q. And you would say that you were familiar with the files of the bank, would you not? [91]

A. Yes.

Q. Now, do I understand that Mr. Waldron approved this method of buying the bond depreciation? A. Yes.

Q. Did he attend a directors' meeting in that connection? A. Yes.

Q. Do you remember when the meeting was held?

(Testimony of William A. Dolan.)

A. Right after his examination. I don't remember the date.

Q. Had you previous to the meeting discussed this method with him?

A. We discussed it with him at the meeting.

Q. At the meeting? A. Yes.

Q. Do you remember what words were said to him and what words he said with reference to that matter?

A. It would be impossible to remember all that was said.

Q. Well, the substance of them, Mr. Dolan?

A. The best of my recollection is that the matter was discussed regarding the depreciation in the bond account, for this reason: We had over $400,000 worth of bonds. One point up or down represented $4,000. In a week's time those bonds would depreciate or appreciate 5, 10, 15, 20 to 30 thousand dollars. It all depended [92] on the time we were examined. If we were examined on a certain day those bonds would be up $30,000; if we happened to be examined another day at another time we would be worth $20,000 less. It was all an estimated depreciation. Of course, Mr. Waldron felt as we did at that time, that we had hit the bottom and when we put up this amount our troubles would be over. The depreciation, or the amount that was put up was more than the amount that they figured the impairment of the capital. The Comptroller at the time, or the Bank Examiner figured something like

(Testimony of William A. Dolan.)

$90,000 impairment. We put up $115,000. So that is the way it was just on that bond business, up and down.

Q. Now, that difference between $90,000 and $115,000, didn't that have something to do with retiring some notes that were not considered very good?

A. No. That was all bond depreciation.

Q. In substance, then, what was said to Mr. Waldron and in what way did you approach the question of asking for his approval or his expression of doubt?

A. Why, the record will show there. I wrote to the Comptroller that he had approved the matter. I could refresh my memory on that point.

Q. You are referring to a letter sent in what month? A. July 22nd, I think it was, 1931.

Mr. Purpus: June.

A. June. [93]

Mr. Dockweiler: June, 1931.

Q. And you recall that later you received a reply from the Comptroller's office to this June letter dated the 24th?

A. I think I answered that this morning, didn't I?

Q. Well, I will show you a letter dated August 20th, addressed by Deputy Comptroller to the Board of Directors.

A. August 20th what year?

Q. August 20, 1931.

(Testimony of William A. Dolan.)

And may I, your Honor, at this time, as I want to put a question to Mr. Dolan, read that letter so as to give your Honor the background, without the necessity of the reporter taking down the words because the letter has already been introduced in evidence?

The Court: Very well.

(Whereupon Mr. Dockweiler read Defendants' Exhibit A.)

Q. Now, you never wrote to the Comptroller that your understanding was otherwise than that these were to be voluntary contributions without expectation of reimbursement, did you?

Mr. Montgomery: I object to that question as calling for a conclusion of the witness.

Q. By Mr. Dockweiler: Well, I will ask whether he ever sent a letter to the Comptroller stating to the Comptroller, in substance and effect, that, "No, Mr. Comptroller, you are mistaken; we expect reimbursement and [94] these are not contributions"?

Mr. Montgomery: I object to that as not the best evidence. We have the letters in evidence. There is no use of arguing it.

Mr. Dockweiler: I don't know whether we have all the evidence. He could state as a fact whether he did ever send such a letter.

Mr. Montgomery: You may ask him if there were any other letters, then.

(Testimony of William A. Dolan.)

Q. By Mr. Dockweiler: Were there any other letters, Mr. Dolan, than the letters we have adduced so far, touching your informing the Comptroller's office of what the plan was and what your understanding was and the understanding of the board as to contributors?

Mr. Montgomery: And I object to that, without showing that all the parties who are plaintiff here had knowledge of the situation and knowledge of these letters, and were put to an election or otherwise that they should notify the Comptroller.

Mr. Dockweiler: But, your Honor, this gentleman was president of the bank and as such obviously in respect to these matters——

Q. By the Court: You have seen the various letters that they have here. Were there any other letters that you wrote to the Comptroller's office that you now recall?

A. Your Honor, it says in this letter: "You are [95] requested to attach to your reply a copy of your daily statement," etc. But they don't have the reply to this letter here, so I must have written a reply. To the best of my recollection, I always replied to those letters.

Mr. Montgomery: Exhibit B is a reply.

The Witness: He just read this one letter. He didn't read the reply.

Mr. Dockweiler: All right. Then, September 8th, Exhibit B.

Mr. Chipkin: Here it is.

(Testimony of William A. Dolan.)

Q. By Mr. Dockweiler: I show you Exhibit B and ask whether you sent any other reply than this one that is marked Exhibit B and dated September 8th, and refers specifically to this August 20th letter.

A. This was his reply to this, then. August 20, 1931, so that is a reply to this letter.

Q. Yes. So, then, that is dated—that copy of yours to the Comptroller is dated September 8th, isn't it? A. Yes.

Q. Then you received in reply to that from the Comptroller——

(Counsel looking for exhibits.)

Q. After your September 8th letter to the Comptroller you received, I take it, a reply; and I am asking whether or not this letter of October 30th to the board from the Comptroller and admitted into evidence as Exhibit D is not [96] the reply of the Comptroller to that, inviting your attention to the first line in which he refers to your letter? A. Correct.

Q. And in which he says: "Referring to the president's letter of September 8th, and particularly that portion regarding the depreciation of your bond account," describing the amounts and so on, then added: "It should be clearly understood by all parties concerned that these contributions are voluntary and unconditionally made, with no expectation of reimbursement from the profits or earnings of the bank." Did you ever, so far as you

(Testimony of William A. Dolan.)

know, make any other reply to that letter, Mr. Dolan, than what we now have in the records?

A. That is the only letter.

Q. And you never sent any reply to the Comptroller, saying that he was under a misapprehension if he thought that they were voluntary and not made with expectation of reimbursement?

A. I stated the facts, that we put up the money, the understanding we had. That was all I could do.

Q. Did you know as a bank president that if that impairment had not been met in a satisfactory way that the Comptroller could have put a receiver in charge and liquidated the bank?

A. That is not mentioned in that section in the letter.

Q. What did you say?

A. Nothing of that kind has been mentioned in any of [97] those letters.

Q. Nothing of the kind has been mentioned in any of the letters, you say. But you knew from your previous advice from the Bank Examiner that it had to be cured and had to be cured satisfactorily, else the Comptroller would close down the bank?

A. No. A lot of banks had quite a lot of depreciation in their bond accounts along those times and they were trying to get along without having any trouble, and a lot of them did get by.

Q. You think that the Comptroller would have let this bank go if he had known the true circumstances of the arrangement of June, 1931?

(Testimony of William A. Dolan.)

A. He let it go until 1934.

Q. He did? A. Yes, sir.

Q. But was he ever informed by you that what he stated in this——

A. The only information he has is those letters. Every letter I wrote to him I stated that the money was put up to purchase the bond depreciation. Why didn't he close it? He was satisfied.

Q. But you made no reply to that letter wherein he states it must be——

Mr. Montgomery: I object to that question as having been asked and answered. [98]

Mr. Dockweiler: If he will just say that he did not make any reply to that or explain to him.

A. I could not tell without looking at the files.

Q. So far as your recollection goes?

Mr. Montgomery: That is immaterial.

The Court: He can examine his files if you wish him to.

The Witness: The Receiver has all the files, Judge.

The Court: I see.

Q. By Mr. Dockweiler: And these contributions in June of 1931 were made in order to keep the bank open, were they not, when the Examiner was pressing you to cure that depreciation?

A. No; nothing said about closing the bank at all; to cure the depreciation in the bond account.

Q. It is a fact, too, isn't it, just for the purposes of the record and to clarify that point, that all of

(Testimony of William A. Dolan.)

these payments were not actually completed in June, but some of them were represented by notes, and then 18 other people had to be interviewed after June 17th, and, as a matter of fact, payments on account of that bond depreciation arrangement of June, 1931, were made in 1932?

A. No; that is not correct.

Q. None of them were made in 1932?

A. The payments had nothing to do with that putting up the money for the bond depreciation. A lot of those [99] notes were sold to the Federal Reserve Bank and we received the cash for them.

Q. Yes. Do you remember when the notes were sold, what part of the year?

A. No. The notes were all put in at the same time the cash was entered up. When the cash was entered on the books the notes were entered. The notes might not have been paid for six months, a year, or maybe two years after. They were carried just the same as your note or anybody else's note.

Q. When you reported it to the Comptroller of the Currency only a few of you gentlemen had on July 17th actually subscribed; the biggest subscriptions——

Mr. Montgomery: Pardon me?

Q. By Mr. Dockweiler: Wasn't it a fact that 18 of these people had still to be contacted?

A. No. That is a misunderstanding. We did not intend to contact any more people. The money

(Testimony of William A. Dolan.)

had been put up. He is referring to the rest of the stockholders.

Mr. Dockweiler: That is all.

A. Who were not contacted. We did not intend to contact them. We contacted all the stockholders we intended to contact.

Mr. Dockweiler: That is all. [100]

Redirect Examination

Q. By Mr. Montgomery: When did you and your brother put up your cash, on what date?

A. What date?

Q. Yes.

A. Very shortly after we had that meeting. I don't remember the exact date.

Q. Would it be July, 1931?

A. Yes; July, 1931.

Q. And the other contributions which were cash were put up at that same time? A. Yes.

Q. This $30,000 in notes that was put up, that whole transaction was canceled, wasn't it?

A. Yes.

Q. And the notes were taken up out of the proceeds of this second—— A. Purchase.

Q. Purchase? A. Yes.

Q. And was any money put up on the $30,000 deal? Did Mr. Kelly put up some which was repaid to him?

A. No; that was just notes, all notes.

Q. All notes? A. Yes.

Q. And they were cancelled? [101]

(Testimony of William A. Dolan.)

A. Yes.

Mr. Montgomery: That is all. Does your Honor want to take the afternoon recess?

The Court: About 10 minutes, gentlemen.

(Short recess.)

Mr. Dockweiler: I think, Mr. Montgomery, you said something this noon, as I recall, or one of your colleagues, as to whether or not we would be prepared to stipulate as to much of what these witnesses would testify. And I don't know, if you feel that you have a factual background, it may be that we could minimize considerable of the court's time. I think already the court has a fair idea of the problem.

The Court: Yes.

Mr. Montgomery: I think this witness will be very short, so I will ask her. [102]

MINNIE PALMER,

a plaintiff herein, called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. Mrs. Minnie Palmer.

Direct Examination

Q. By Mr. Montgomery: And your name was formerly Minnie Baxter? A. Correct.

(Testimony of Minnie Palmer.)

Q. I show you Plaintiffs' Exhibit No. 4, and call your attention to the name "Minnie Baxter" there.

A. Yes.

Q. I see a pencil annotation "Pd $850." Was that cash? A. It was.

Q. Contributed at the time?

A. Yes. And Mother paid $2,000.

Q. And your mother is Jennie Pomeroy?

A. Correct.

Q. And she paid $2,000 cash. And then the balance of your account, $3,000, was——

A. A note.

Q. ——a note which was paid later?

A. Yes. [103]

Q. So that you have contributed in full the amount of $3,850, and your mother $1,500 more, making her total contribution $2,500?

A. Correct.

Q. I will ask you the circumstances of signing this Exhibit 4.

A. Well, I was called in by Mr. Dolan and in the presence of he and Mr. Tuffree this was given to me and—Well, it states for itself what it is, and I signed it.

Q. Is this the only paper that you signed or the only arrangement or agreement which you had?

A. Yes.

spondence with the Comptroller of the Currency?

(Testimony of Minnie Palmer.)

A. I did not.

Mr. Montgomery: Cross-examine.

Mr. Dockweiler: May I ask opposing counsel whether my file is in their possession?

Mr. Montgomery: What is that?

Mr. Dockweiler: My file containing the complaint?

Mr. Montgomery: No. I might ask one more question.

Q. You never were paid back any of this money?

A. None.

Q. Nor your mother? A. No. [104]

Cross Examination

Q. By Mr. Dockweiler: You are Mrs. Palmer, formerly Minnie Baxter? A. Correct.

Q. And you signed this document that has been introduced as Exhibit 4 under the name of "Minnie Baxter" for $3,850? A. Correct.

Q. And did I understand your testimony to be that you were not a director? A. I was not.

Q. And is another one of the signers a relative of yours? A. Just my mother.

Q. Who was that?

A. Mrs. Jennie Pomeroy.

Q. Mrs. Jennie Pomeroy? A. Yes.

Q. And she signed for $3,500. Now, both of you paid your full cash? A. Yes, sir.

Q. Who obtained your signature and your mother's, if you know?

(Testimony of Minnie Palmer.)

A. Mr. Tuffree and Mr. William Dolan.

Q. That was Mr. Tuffree who testified this morning? A. Yes. [105]

Q. And Mr. William Dolan who has just concluded his testimony? A. Yes, sir.

Q. When did they first present the document to you?

A. Well, I would say along about the first of July.

Q. Yes; about the first of July. And which one of the two? A. They were both there.

Q. Both there. And what did they say?

A. Well, they gave me this and I was supposed to get it back. Of course, I wouldn't put $8,000 in without getting it back.

Q. They said what, as nearly as you can recollect?

A. I can't remember the conversation.

Q. The substance?

A. All I can say that they expressed it as it stands there, as near as I can tell you. I can't tell you exactly what they said. They were buying the depreciation of the bonds with the expectation of getting it back.

Q. Did they ever tell you what would happen if this was not signed up?

A. Well, of course, we all considered we were helping ourselves as well as the bank. We were

(Testimony of Minnie Palmer.)

stockholders and we were helping ourselves as well as the bank.

Q. And you knew the bank's financial condition?

A. I did not. I did not. I supposed it was A-1. [106]

Q. A-1. They did not discuss with you that there was any impairment of the——

A. They did not.

Q. ——financial condition?

A. No; they did not.

Q. Didn't you ask any questions as to why you should have to advance money to the bank?

A. No; I can't say that I did.

Q. You do know now that the bank's capital was impaired at that time?

A. I found it out now; yes.

Q. When did you first find it out after signing that document?

A. Well, I don't think I really felt very nervous about it until after the Receiver came in. When it was in the hands of the conservator I can't say I really felt very much about it.

Q. Down through 1931 and through 1932?

A. I think it was through 1931 and through 1932. I won't be sure about the date.

Q. I think the record shows that it was in March of 1933, just after the bank holiday. But in any event, it would not be until that time that you had any idea that the bank's capital was impaired?

(Testimony of Minnie Palmer.)

A. None whatever.

Q. Did you ever have any other discussions with either [107] of these gentlemen or with any other officer or director of the bank subsequent to July 1st, namely, subsequent to this first conference at which you signed the——

A. No; I did not.

Q. When did you pay your money?

A. I made the first payment, I think just at the time the note was drawn up, and the other was probably made in—well, I made my final payments in 1934.

Q. In 1934 on this. How much do you think you paid during the summer and autumn of 1931?

A. I don't think I paid only the original $850.

Q. Only $850? A. That is all.

Q. And then when did you pay after the $850? For instance, that was paid at what time?

A. $850 at the time the note was drawn up.

Q. When was that?

A. That was in July.

Q. In July you actually paid $850?

A. I did.

Q. And then a note was given for the balance?

A. Yes.

Q. When did you begin to pay off on the note?

A. I believe it was after Mr. Hogan came in.

Q. After Mr. Hogan came in. The same for your mother? A. Yes. [108]

(Testimony of Minnie Palmer.)

Q. Each in identical situations, so far as that is concerned? A. Yes.

Q. With an eight hundred and some odd payment in July and note for the balance, on which payments were not made until the Receiver came in?

A. I think that is correct.

Q. And this document, this June, 1931, signed arrangement was never discussed?

A. No; it was not.

Q. After the one time? A. No; it was not.

Q. That is, with officers of the bank or directors? A. No.

Mr. Dockweiler: I think that is all.

Mr. Montgomery: Just a minute.

Redirect Examination

Q. By Mr. Montgomery: Who did you make these payments on your note to?

A. The final payments?

Q. Yes.

A. To Mr. Hogan after he became conservator or Receiver.

Q. Did you pay the Reserve Bank at any time?

A. I paid interest into the R.F.C., but I don't think [109] I paid them any principal. I am not sure that I did. I don't think I did. But the principal was all paid up after Mr. Hogan came in.

Mr. Montgomery: That is all. Call Mr. Del Giorgio. [110]

M. DEL GIORGIO

a plaintiff herein, called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. M. Del Giorgio.

Direct Examination

Q. By Mr. Montgomery: I show you this Exhibit 4, Mr. Del Giorgio. Is this your signature?

A. Yes.

Q. Will you state the circumstances of signing that paper?

A. Well, they called me to the office—I was there and they called me in there and they tell me they had to raise this capital on account of them bonds. So they said they had to pay this, pay this money. I told them I didn't have any money. They said you don't have to have the money.

Q. You gave them a note?

A. So I gave them a note.

Q. Now, did you know anything about any correspondence between the president of the bank and the Comptroller? A. No.

Q. None of that was discussed with you?

A. No.

Q. You are a stockholder only? [111]

A. A stockholder; yes.

Q. Did you ever discuss it with the officers of the bank afterwards? A. No.

(Testimony of M. Del Giorgio.)

Q. Is this all you know about it?

A. That is all I know. I know they had a few names in there and I put my name in it.

Mr. Montgomery: Cross-examine.

Cross Examination

Q. By Mr. Dockweiler: Your name is Mr. Del Giorgio? A. Del Giorgio.

Q. Mr. Del Giorgio, when was this document, Plaintiffs' Exhibit No. 4, first shown to you by any officer or director of the bank?

A. Well, I was at the bank. They wrote me a letter.

Q. Wrote you a letter. What did they say in the letter? A. They said to call at the bank.

Q. To call at the bank. Do you remember in what month that was of 1931? A. I don't remember.

Q. But it was in 1931? A. Yes, sir.

Q. Was it in the summer time? A. Yes.

[112]

Q. You would say shortly after June 18, 1931?

A. Something like that.

Q. So they wrote you a letter to come into the bank, and who saw you at the bank?

A. Mr. Dolan.

Q. Mr. Dolan.

A. And another director, I think Mr. Tuffree.

Q. Mr. Tuffree.

A. I think so. I don't know for sure.

(Testimony of M. Del Giorgio.)

Q. And were they both together?

A. Both together.

Q. And they both saw you in the bank?

A. Yes.

Q. And what did they say to you and what did you say to them?

A. Well, they tell me they have to raise some money. And according to these bank—what it says, the examination of the bank that examined the bank, and they got to raise some money; and according to these, all the stockholders had to raise some money and raise $175 a share. So I told them I didn't have any money. They said, "That is all right." They said, "Sign the note." So I did sign the note.

Q. Then, as I understand, they said to you that the bank had to raise some money? A. Yes.

[113]

Q. Did they tell you for what reason?

A. Well, they just told me they had an examination of the bank.

Q. Have had an examination of the bank?

A. Yes; some examiner. Anyway, some kind of an examiner, so they said, they told me they had to raise some money.

Q. And that every stockholder had to pay $175 a share?

A. I don't know whether every stockholder paid or not, but I know I went in there. I know some didn't go in.

(Testimony of M. Del Giorgio.)

Q. But in any event, you signed at that time, that very day? A. That very day.

Q. For $875? A. Yes.

Q. And you did not pay any cash? A. No.

Q. You made a note? A. Yes.

Q. When did you begin paying on the note?

A. Well, I never did pay on the note.

Q. You never have paid?

A. The final assessment I paid up, the last.

Mr. Montgomery: He means the stockholders' assessment.

Q. By Mr. Dockweiler: Oh, yes. The stockholders' liability assessment? [114] A. Yes.

Q. But you have never paid on this note?

A. No.

Q. Anything on this note? A. No.

Mr. Dockweiler: That is all.

Mr. Montgomery: That is all. Call Mr. Kelly. [115]

L. J. KELLY,

a plaintiff herein, called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. L. J. Kelly.

Direct Examination

Q. By Mr. Montgomery: Mr. Kelly, were you one of the directors of the First National Bank?

(Testimony of L. J. Kelly.)

A. Yes, sir; in about '31.

Q. In 1931 at the time of this purchase of the bond depreciation you were on the board?

A. Yes, sir.

Q. Is this your signature on Exhibit 4 "L. J. Kelly 4,900"? A. Yes, sir.

Q. Did you put up your note for that $4,900?

A. Yes, sir.

Q. And have since paid that note?

A. Yes. I mortgaged my ranch and paid it.

Q. And have you received any part of that back?

A. Not a cent.

Q. Now, did you know of any correspondence with the Comptroller of the Currency with regard to this particular transaction? [116]

A. Not until after they got our notes, a few months afterwards before I ever heard of it.

Mr. Montgomery: Cross-examine.

Cross Examination

Q. By Mr. Dockweiler: Mr. Kelly, you were a director of the bank in 1930, in June, 1930, were you not?

A. I don't know. I know this business come up just after I was elected. I don't know whether it was 1930 or 1931.

Q. You have no recollection as to——

A. No. I was a new director, the last one on. I believe it is '31, because it was not long until the Bank Examiner began talking about the depreciation.

(Testimony of L. J. Kelly.)

Q. You can recall the first directors' meeting you attended, can you?

A. I believe it was at the annual meeting in '31, in January or February.

Q. Now, Mr. Kelly, I show you the original minute book which we have been using in the course of examination of witnesses during this trial. And I now point to the minutes of the directors' meeting of September 17, 1931. Now, you were present at that meeting, were you not? A. Yes, sir.

Q. At which was read this letter of August 20, 1931, from the Comptroller's office to the directors of the bank, [117] and the president's reply, Mr. Dolan's reply of September 8, 1931?

A. Well, I——

Q. In that connection to refresh your memory, refer to the last paragraph of the minutes of that meeting. A. Well, I don't remember now.

Q. Well, do you think if it says that these two letters were read that they were read at that time?

A. I don't know. I can't remember.

Q. You were present probably during the course of the whole meeting?

A. I was supposed to be there. I didn't miss very many of them.

Q. You didn't miss many. You have no independent recollection? A. I can't say right now.

Q. Taking the subsequent meeting of November 19, 1931, pointing to the minutes of that meeting, I

(Testimony of L. J. Kelly.)

will ask you to direct your attention to the last paragraph and state whether or not you recall whether that letter dated October 30, 1931, from the Deputy Comptroller to the Board of Directors of the bank was read at the meeting?

A. I remember some of those letters being there. I just can't take that letter or a date. We always said we would never do it.

Q. Referring to this letter of August 20, 1931, [118] being the first of the Comptroller's letters to which I have referred, do you ever recall any correspondence in which it would appear in words to this effect: "Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard." Do you remember hearing any letter like that?

A. Very often; but we never consented.

Q. Very often; but you never consented. And then the later letter to which I referred, the Comptroller's October 30, 1931, letter, such a paragraph as this do you remember: "It should be clearly understood by all parties concerned that these contributions are voluntary and unconditionally made, with no expectation of reimbursement from the

(Testimony of L. J. Kelly.)

profits or earnings of the bank." Do you recall that? A. We had the letters there.

Q. Now, you say that when you signed this June arrangement you did not pay cash?

A. I paid a note.

Q. Oh, you gave a note? A. I gave a note.

Q. Gave a note and no cash? [119]

A. Yes, sir.

Q. Your amount was $4,900, is that right?

A. Yes, sir.

Q. And you gave a note for $4,900. When did you begin to pay off on that note?

A. When Mr. Hogan came.

Q. That would be after 1934?

A. 1934. I mortgaged my ranch and paid it.

Q. And that has been since 1934? A. Yes.

Q. Following those letters from the Comptroller's office in 1931, did you ever make any effort to, we will say, reestablish the status quo or let the Comptroller know that you were operating on a theory that you were going to get your money back out of the appreciation in the bond account?

A. I don't get what you mean.

Q. In other words, did you ever let the Comptroller's office know that you did not consider that a voluntary contribution made without expectation of reimbursement?

A. Well, I don't know it was. I just figured the way we signed it up, and we done it on the advice of the Bank Examiner.

(Testimony of L. J. Kelly.)

Q. And those letters from the Comptroller never inspired any doubt in your mind?

A. Well, at that time the government didn't want to [120] close the banks, any of them. If they closed that bank, every little bank in the county would close, all other banks. The government didn't want to do it.

Q. But you did nothing, in other words?

A. Well, I couldn't. I didn't know enough at that time.

Mr. Dockweiler: Yes. That is all in cross examination.

Mr. Montgomery: Just a minute.

Redirect Examination

Q. By Mr. Montgomery: Are you familiar with your father's affairs? He is one of those signers?

A. Yes, sir.

Q. Did he pay by note?

A. Yes; he paid by note and then his note was immediately sold to the Federal Reserve Bank.

Q. That is F. Kelly $5,000? A. Yes, sir.

Q. And do you know whether he has paid off that note or not?

A. Yes, sir. They came out and attached his ranch and took it away from him.

Q. Has he received any portion of this?

A. Not a cent.

Mr. Montgomery: That is all. [121]

(Testimony of L. J. Kelly.)

Mr. Dockweiler: That is all.

Q. By Mr. Montgomery: He was not a director, was he? A. Yes, sir.

Mr. Heinz (William J. M. Heinz): Mr. Dockweiler, I think it could be stipulated on behalf of my client, Ernest F. Ganahl, that the allegations in the complaint are true and coincide with the records; and in that event it will not be necessary to produce Mr. Ganahl personally, who is very busy today.

Mr. Chipkin: We can stipulate that he will testify in substantially the way he alleges in his complaint, but I do not think we can stipulate it is true.

Mr. Heinz: It is then stipulated that Ernest Ganahl executed this note of $1,750, on which he paid the sum of $550.89 principal and the sum of $150.31 in interest; that he delivered this note under this agreement, purchasing depreciation in the bond account; that he thereafter filed this claim with the Receiver for this amount, and that no part of that money advanced under said note has been repaid by the bank.

Mr. Chipkin: All but that he paid it under an agreement. We deny an agreement between the bank and Mr. Ganahl.

Mr. Heinz: Purported agreement we will put it that way, referring to Exhibit 4.

(Testimony of L. J. Kelly.)

Mr. Montgomery: In other words, his signature is here on the Exhibit 4. They will stipulate that.

[122]

Mr. Dockweiler: Oh, we will stipulate that that is his signature.

Mr. Chipkin: Yes; that that is his signature.

Mr. Heinz: That the amount set after his name is the amount subscribed by him in the manner in which I have now stated?

Mr. Chipkin: Yes; that is correct.

Mr. Montgomery: That is the fifth signature here.

Mr. Purpus: There is another party having the name of Yungbluth, F. A. His name also appears upon this document for $1,750. It shows "11-23-32" alongside of "$1,750.00." You in your answer—where is that, Judge, do you know? There is no part of that has been repaid. I find alongside of that document—he is not in court today—that the date set opposite is November the 23rd, 1932, so I presume it was paid. We can check the books. It is a note or it is money, either one. Anyhow, he gave a note or money, did he not? It wouldn't make any difference for the purpose of this action, as I see it.

(Counsel conferring together privately.)

Mr. Montgomery: We will put on Mr. Hogan and do that later. No; we will put on Mr. Dolan.

[123]

F. H. DOLAN,

a plaintiff herein, called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. F. H. Dolan, or Francis H.

Direct Examination

Q. By Mr. Montgomery: Mr. F. H. Dolan. I show you Plaintiffs' Exhibit No. 4, and ask you if the second signature there is yours?

A. Yes.

Q. That is $32,500. How did you pay that, in cash or note? A. In cash.

Q. At what time?

A. In the first part of July, 1931.

Q. Did you know anything about any correspondence from the Comptroller of the Currency at the time you paid this cash? A. No.

Q. When did you first learn of any such correspondence?

A. Oh, I think it was—as I recall, it was during the trial we had here some time back.

Q. The one against your brother?

A. Yes; something of that kind. I might have heard [124] of that before, but that is my best recollection.

Q. How did you carry this item on your books?

A. I carried it as a——

Mr. Dockweiler: Oh, objected to as incompe-

(Testimony of F. H. Dolan.)

tent, irrelevant and immaterial, not binding, of course, on the bank.

The Court: That is correct. Sustained.

Q. By Mr. Montgomery: Did you have any conversation with Bank Examiner Lamm with regard to the method of handling this matter? A. No.

Q. Did you have any with the subsequent Bank Examiner?

A. No. I might have had a conversation with Mr. Lamm in regard to this matter prior to my putting up this $32,500 which I did. I rather recall having a conversation at a meeting.

Q. With Mr. Ganahl—I mean Mr.——

A. With Mr. Lamm.

Q. Have you received any portion of this $32,500 back? A. No.

Q. Did you know what your stockholder's liability was at the time you put up this $32,500?

A. Yes.

Mr. Dockweiler: Objected to as incompetent, irrelevant and immaterial. It obviously could not be known in 1930. The bank did not fail until 1934, your Honor, or 1931. [125]

The Court: I suppose he means what his maximum liability would be.

Mr. Montgomery: Yes.

Q. Do you know what your maximum liability was? A. Yes.

Mr. Montgomery: You may cross-examine.

(Testimony of F. H. Dolan.)

Cross Examination

Q. By Mr. Dockweiler: Now, Mr. Dolan, do you remember when you became a director of the bank? A. No; I do not.

Q. Well, in what year?

A. No. I was a poor director.

Q. A poor director?

A. I was not—I don't live in Anaheim.

Q Oh, yes.

A. And I was the fall guy, as they say—as I say.

Mr. Montgomery: Better talk court language.

The Witness: Beg pardon?

Mr. Montgomery: Better talk court language so the Judge will understand.

The Witness: I beg your pardon.

Q. By Mr. Dockweiler: Mr. Dolan, were you at any time an officer of the bank? A. Yes.

Q. What officer? [126]

A. I think they made me vice-president, honorary.

Q. You don't know when, what year?

A. No.

Q. In that connection I invite your attention to the minute book which we have used——

A. Yes.

Q. ——during the course of this trial, and invite your attention, for instance, to the meeting of September 17, 1931, at which it would appear that you were one of the directors present.

(Testimony of F. H. Dolan.)

A. Yes.

Q. I will ask you whether or not that would refresh your memory as to whether or not you were present at a meeting in September.

A. I might have been there and gone away.

Q. You might have been and gone away?

A. Yes; I might have showed up at the meeting and then left, like I did at times, so that would not refresh my memory a great deal.

Q. You never caused the secretary to note the time you spent?

A. No; I don't suppose. No; I am very bum on this business.

Q. Referring to the last item noted by the secretary in the minutes, the reference to "a letter from the Treasury Department dated August the 20th and Mr. Dolan's reply [127] thereto dated September 8th were read and ordered filed", do you recall, looking over those two letters, whether or not you heard them read at that time, and particularly I invite your attention to the fourth paragraph of the Comptroller's August 20, 1931, letter.

A. No. This is all very recent to me. It has come up since, all this matter. I can't recall myself knowing about these matters.

Q. Do you say positively that you did not hear it read on that occasion?

A. I could not say positively; no. But I can't refresh myself in any way that I know of on these

(Testimony of F. H. Dolan.)

matters. I figured that I was putting up $32,500 and I was buying a depreciated bond account; and it was explained to me that the interest from that bond account would pay my investment. Otherwise, there would be a return in investment, as well as keeping the bank going.

Q. There would be a return in your investment, as well as keeping the bank going?

A. A further investment. It was explained to me along that line.

Q. By keeping the bank going you mean——

A. I think that has come up later in my mind. I don't think there was ever anything discussed about the bank being closed.

Q. Never at any of those meetings that you ever [128] attended?

A. No; I don't recall any of those meetings that there was ever discussion. They were not talking about closing our bank.

Q. You mean that you advanced $32,500 in cash simply as an investment to buy a depreciated bond account?

A. I did not—I will answer it: I did not deposit the $32,500 or make the purchase under stress.

Q. Well, no; I just asked you the question. You say you did it as an investment?

A. It seemed to be an investment feature to it.

Q. Well, what was the other feature besides the investment?

(Testimony of F. H. Dolan.)

A. I was interested, naturally, in the bank.

Q. You mean in preventing the bank being closed?

A. No. I was interested in seeing the bank do well if possible.

Q. Was it doing very well at that time?

A. Well, most of the things were not doing very well at that time.

Q. Wasn't it a fact it was doing rather badly?

A. Well, the bond account was in a very bad shape, as I recall, and we had great faith in the bond account. We thought that they were like real estate, that they would come up.

Q. And you knew at that time that the Comptroller's [129] office was requiring the directors to build up that bond account, did you not?

A. Well, I can't say that we were forced in any way.

Q. No, no. Just whether you knew that the Comptroller's office was compelling the bank's——

A. I think there was some discussion with me with the officers, with my brother, that it would be a good thing to do.

Q. Well, as a director, what did you think would happen if you did not contribute $32,500?

A. I don't know. I suppose the general course would take place if that was not taken and other things had gone on. I suppose that bank might have to reorganize and do some other things.

(Testimony of F. H. Dolan.)

Q. Did it never occur to you that if you did not remedy the bond situation the Comptroller would place a Receiver in charge?

A. No; not exactly.

Q. I understand, however, that it was not merely the investment feature that actuated you in making this $32,500 contribution?

A. I understood it would make our investment, our bank, in a better position to make the investment.

Q. But you made that contribution?

A. Not a contribution; never.

Q. I mean whatever it was? We will just call it—— [130] A. Investment we called it.

Q. You call it "investment." What did you think you had for your investment? You knew you did not own the bonds, didn't you?

A. Well, I don't know whether I did or not. I understood that they were to be set aside. It was the intention that interest received from bonds equalling the amount of depreciation purchased be set aside for the use of the undersigned. An appraisal of the bond list shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro-rata among the stockholders purchasing depreciation in bond account.

Q. You were a director of the bank during the summer and succeeding months and succeeding

(Testimony of F. H. Dolan.)

years until it was taken in charge of by the Comptroller, were you not? A. I was.

Q. And you would interest yourself in the bank's financial condition from time to time, wouldn't you?

A. Very little. As I say——

Q. Did you ever look over a bank statement?

A. I don't know bank statements. I am a farmer and a real estate man. I know nothing about bonds or organizations. I am a one-man affair.

Q. You never noted in any statement gotten out by the bank that there was such and such an item of bonds and [131] then the aggregate amount?

A. I don't believe I could have analyzed it if I had seen it.

Q. When did it first occur to you, or when did you first hear that the condition of this bank financially was bad and that it might be taken over by a receiver? A. I never heard that statement.

Q. You attended directors' meetings?

A. Yes.

Q. Right along? A. Yes.

Q. Every month, I suppose?

A. I never heard the bank was to be closed. No one ever said they would turn the keys on it, Mr. Waldron or Mr. Lamm. I met them a time or two, not very often.

Q. And these letters from the Comptroller's office that were read did not inspire you with that thought?

A. Did not impress me along that line.

(Testimony of F. H. Dolan.)

Q. And you haven't today any clear idea as to whether or not you were buying an interest in the bonds or merely an interest in what was called the depreciation of the bond account?

A. Well, indeed, I thought I was purchasing something, buying something.

Q. Well, something that you could get hold of, you mean, like—— [132]

A. Yes. I thought I was buying an interest in a depreciated bond account; whatever would come back would come back to me, and it was shown to me that it would come back.

Q. And so, if a bond worth nominally $100, upon depreciation had gotten down to, say, $40, did you figure that you owned a part of that bond?

A. The raise.

Q. Or only the point between $40 and whatever it might be? A. Might be, yes.

Q. You didn't think you owned any part of that $40?

A. I don't know how to explain it, just what it would be, but I expected that was enough in there that would show up to pay me back, would come back and pay us back, and it would be just a loan or a temporary affair.

Q. A loan, would you say?

A. Well, it was an investment and it would be paid back and we would get interest.

Q. Do you remember who drew up that memorandum?

(Testimony of F. H. Dolan.)

A. No. It was sent to me. I requested it and my brother sent me one of those copies to put in my files.

Q. You are referring now to what could be called the subscription list? A. Yes.

Q. That is Exhibit No. 4? [133]

A. Yes. I couldn't say when it was done now, but it has been in my files for years and I have put it on my financial statement as $32,500 bonds invested, and carried it as such.

Mr. Dockweiler: That will be all, thank you, on cross examination.

Mr. Montgomery: That is all. Call Mr. Hogan. Call Mr. Hogan under 2055. [134]

J. V. HOGAN,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. J. V. Hogan.

Direct Examination

Q. By Mr. Montgomery: Mr. Hogan, you are the Receiver of the defendant bank, or, rather, you are one of the defendants in this action?

Mr. Dockweiler: No. He appears on behalf of the bank only.

(Testimony of J. V. Hogan.)

Mr. Montgomery: I say, you appear on behalf of the Anaheim First National Bank, defendant herein? A. Yes.

Q. You have handled the business since January, 1934? A. January 15, 1934.

Q. Now, what is the situation with regard to F. A. Yungbluth who has signed this Exhibit 4? You have seen this before, haven't you?

A. Yes.

Q. Now, this shows a payment by him of $1,750. Was that cash or a note or what?

A. I couldn't state.

Q. Well, don't your books show?

A. No. We haven't the records here that would [135] disclose that, part of the receipts.

Q. Where are they?

A. They are in my bank in Huntington Park.

Q. Haven't you any data up here at all that shows what the situation is with regard to Yungbluth? A. No.

Q. Have you any independent recollection that Yungbluth gave a note which you transferred to the Federal Reserve Bank?

A. No. I have no dealings with Mr. Yungbluth, so far as this subscription is concerned.

Mr. Purpus: May I interrupt just a moment? Mr. Dolan says he knows he paid it in cash, if that would satisfy you.

Mr. Chipkin: I understand he paid it to the Federal Reserve Bank.

(Testimony of J. V. Hogan.)

Mr. Purpus: That is right; in 1932.

Mr. Chipkin: We will say he paid it to the Federal Reserve Bank. We will stipulate.

Mr. Purpus: He paid it on a note and paid it up?

Mr. Chipkin: We will stipulate that he paid it to the Federal Reserve Bank.

Q. By Mr. Montgomery: Which is a note that was given to take up this subscription?

A. Well, I couldn't say, I couldn't say.

Mr. Chipkin: We will stipulate that. [136]

Mr. Montgomery: I see. We will stipulate that.

Q. You never paid any part back? A. No.

Q. As a matter of fact, you paid none of these stockholders back? A. No.

Q. Any of this money that they had put up?

A. No.

Q. What is the present situation of your bond account, got any left?

A. No. The bonds were—the majority of the bonds of the Anaheim First National Bank were pledged to the County for County funds, and also to the City of Anaheim.

Q. I didn't ask you the detail. I am asking you if you have got any left?

A. No; I don't believe so.

Q. Then the bond account is all gone now, is it?

A. Practically. I could refer to my books and give you a more intelligent answer.

Q. There is something you want to look at?

(Testimony of J. V. Hogan.)

A. I might state that Mr. De La Mare, my first assistant office manager, is here, who is very familiar with the books of the Anaheim First National. Naturally, I have some two or three banks to liquidate and it is almost impossible for me to remember the transactions that transpire in each one of the banks. [137]

Mr. Dockweiler: I suggest, when you finish with Mr. Hogan, Mr. Montgomery, that you use Mr. De La Mare who has been the man under Mr. Hogan?

Mr. Montgomery: I have got enough now to satisfy me. He said the bond account is gone, and that is all I want.

Mr. Purpus: Is that the true fact from the books?

Mr. Dockweiler: No. There is some of them left.

Mr. Montgomery: What have you got, $20,000 left for us in value—I mean market value?

Mr. Dockweiler: Were you through with Mr. Hogan?

Mr. Montgomery: Yes; I am through.

Mr. Dockweiler: I would like to ask Mr. Hogan a few questions, seeing that he is on the stand.

Cross Examination

Q. By Mr. Dockweiler: Now, Mr. Hogan, do you have a general idea of the condition of the bank as you took it over, in this, do you know whether or not you took over certain bonds along with the bank? A. Yes, sir.

(Testimony of J. V. Hogan.)

Q. And you have a general idea of what the face value of those were; that would be the par value or——

Mr. Montgomery: Now, I object to that as not proper cross examination.

Mr. Dockweiler: Well, I will reserve that and put him on at a later time to clarify that. [138]

Mr. Montgomery: All right.

Mr. Dockweiler: And I will withdraw that question and later on use him on direct.

Mr. Montgomery: May I inquire how long it will take him to figure out that, and then we can have the exact figure. Can you have that in three minutes or five?

The Witness: If you can read it.

Mr. Montgomery: Why not let it go over until tomorrow morning and then they can have the information.

(Whereupon an adjournment was taken until Wednesday, July 21, 1937, at 10:00 o'clock a. m.)

[139]

Los Angeles, California,
Wednesday, July 21, 1937, 10 A. M.

(Parties present as before.)

Mr. Montgomery: I think it was suggested last night that Mr. De La Mare would take the stand in place of Mr. Hogan in order to prove up the bond account.

(Testimony of J. V. Hogan.)

The Court: Yes.

Mr. Dockweiler: Unless you want to stipulate to it.

Mr. Montgomery: I don't know the facts myself, but I think probably he can tell us.

Mr. Dockweiler: As to his qualifications, he having kept the books and been in charge of all of the ledger accounts of the receivership since Mr. Hogan took it over in January, 1934, will you stipulate?

Mr. Montgomery: Oh, so stipulated, certainly.

Mr. Dockweiler: And that he has kept them under the directions of Mr. Hogan?

Mr. Montgomery: All right. Will you take the stand, and you had better take your list along. [140]

ROY DE LA MARE,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. De La Mare, Roy.

Direct Examination

Q. By Mr. Montgomery: Mr. De La Mare, you have the books of the Anaheim First National Bank and have gone over them, have you?

A. I didn't quite understand the question.

Mr. Montgomery: Will you read it, please?

(Question read by the reporter.)

(Testimony of Roy De La Mare.)

A. I have some of the books here, not all of them.

Q. You have the books that show the bond account? A. Yes.

Q. How many bonds were in the account on July 20, 1931, in dollars and cents, according to the book value?

A. I would have to refer to the bank ledger which is over there on the table.

Mr. Montgomery: May we have the bank ledger?

The Court: What is the date again that you have given?

Mr. Montgomery: July 20, 1931. I think the book value was of June 24, 1931.

Q. Is it not?

A. Which date do you wish? I have both dates here. [141]

Q. Let us take the book value on July 20, 1931.

A. On July 20, 1931, the books of the Anaheim First National Bank disclose a book value $219,-602.26 in other bonds.

Q. "And other bonds"?

A. "In other bonds." That is the total of the account in other bonds.

Q. What do you mean by "other bonds"? You mean there was bonds on which there was no depreciation?

A. I couldn't state that question. I am merely testifying to what the books of the Anaheim First National Bank show on that particular date.

(Testimony of Roy De La Mare.)

Q. All right. What does it show as of June 24, 1931? A. $384,439.80.

Q. Were there some bonds in the account that were not depreciated?

A. According to the records of the Bank Examiner, whose copy of whose examination was in the book, it showed some of the bonds did not show any depreciation as of that date.

Q. What was the book value on June 24, 1931, of the bonds which did not show such a depreciation? A. $69,171.73.

Q. How much was the book value of the bonds on June 24, 1931, that showed a depreciation?

A. $312,279.84.

Q. Was there a difference in the book value of bonds [142] between the 18th day of June and June 24, 1931?

A. Will you please repeat that question?

(Question read by the reporter.)

Q. That is to say, was the value on June 18 approximately the same as it was on the 24th?

A. It was less by $2,095.

Q. By the Court: Which date? You say the June 18th was less than June 24th?

A. No. June 24th was less than June 18th.

Q. By how much? A. $2,095.

Q. By Mr. Montgomery: And do you happen to have the figures of the par value?

A. No. That difference was occasioned by a sale of bonds.

(Testimony of Roy De La Mare.)

Q. Of these $312,279.84 book value of bonds on June 24, 1931, there were exchanges made, were there not, for other bonds?

A. Numerous exchanges.

Q. And what was the total of those exchanges?

A..The total book value of the exchanges made was $134,902.41.

Q. And the book value of those that were received in exchange amounted to what?

A. $140,193.55.

Q. How much of the original bonds that were in the [143] account on June 24, 1931, were turned over to the receiver?

A. That would require a little figuring.

Q. Well, what would you do, deduct $134,902.41 from the $312,279.84? A. Not necessarily.

Q. Were any of the bonds disposed of that are not shown in this exchange list of $134,902?

A. Any of what bonds?

Q. Any of the original list of June 24, 1931?

A. Were any of them disposed of, did you say?

Q. Yes; other than by the exchanges?

A. When?

Q. Between June 24, 1931, and the time that the bonds were turned over to the receiver.

A. Yes.

Q. Have you a statement showing how many of those bonds were sold? A. There was——

Q. Perhaps I can shorten it. Can you give us the amount in book value of bonds that was turned

(Testimony of Roy De La Mare.)

over to the receiver on—what was it, January 15, 1934?

A. Do you mean by that the original list—from the original list and from the exchanges?

Q. Yes.

A. If I may have my other ledger over there, the receiver's ledgers, I can probably tell you that. (Examining [144] book.) The book value of bonds shown by the books of the bank turned over to the receiver, $217,807.76.

Q. That was the book value as of the date of turn-over? A. Yes.

Q. Have you the book value of the bonds that remain on hand, if any? A. $77,549.67.

Q. That is the book value as of what date?

A. As of the same date the receiver took them over.

Q. You don't know what the present value is?

A. Market value?

Q. Yes.

A. Taken from the bonding house this morning, the market value of those bonds is $16,590.

Mr. Montgomery: Cross examine.

Cross Examination

Q. By Mr. Dockweiler: Mr. De La Mare, you have, pursuant to my suggestion, prepared a list reflecting the bond condition of this bank, that is, what we will call the portfolio of bonds, beginning with June 24 and really ending as of today?

A. Yesterday.

(Testimony of Roy De La Mare.)

Q. Or yesterday? A. Yes, sir.

Q. And you have that before you, do you not? [145]

A. I have.

Q. And that consists of two pieces of paper, does it not? A. Yes.

Q. And in the preparation of these two documents what have you had before you?

A. The books of the bank, the receiver's records, and a copy of the examiner's report dated June 24, 1931.

Q. That is Examiner Waldron?

A. It so states on the report.

Q. And by the terms "books of the bank" you refer to the bank during the course of administration prior to the receiver taking it over?

A. That is correct.

Q. And then the receiver's books being the books reflecting the condition of the bank since his taking the bank over? A. All of the operations.

Q. The receiver's transactions, in other words. Are you able to tell from these documents what bonds the bank had on June 24th, which appears to be the date of this contribution arrangement?

A. You mean all the bonds, Mr. Dockweiler?

Q. Yes. Or maybe I could put it this way: Ask you some questions directly from your prepared memoranda, and then you explain what the various columns represent. [146] Probably that would be simpler. Now, I have before me what appears to be

(Testimony of Roy De La Mare.)

one of the documents prepared by you, entitled "Disposition of Bonds." In the first column what is to be noted? A. The par value.

Q. The par value of the bonds as of what date?

A. June 24, 1931.

Q. Yes. In the second column?

A. Description of the issue.

Q. That is, of each issue of bonds?

Mr. Montgomery: Might I look at this just a moment?

Mr. Dockweiler: Yes, sir.

Mr. Montgomery: And get an idea of what you are talking about.

(Counsel conferring privately over exhibit.)

Q. By Mr. Dockweiler: Now, the second column, as I understand, will give us a description of the bonds individually, the rate of interest and the date of maturity, is that right? A. Correct.

Q. Then in the third column what do we find?

A. The third column indicates any of those bonds pledged by the bank prior to suspension for deposits of public moneys, or for bills payable, as the bank having borrowed money from some organization.

Q. And to whom would they be pledged, do you find, how [147] many pledgees? A. Three.

Q. Three pledgees.

Mr. Montgomery: Just a minute. I would like to interpose an objection, your Honor, to any evidence as to what became of bonds after the con-

(Testimony of Roy De La Mare.)

tribution was made, except that they passed into the hands of the receiver and have now been disposed of. In other words, they were not set aside for us, so I think it is immaterial what the bank did, unless it is before the date of the money being put up by the various contributors.

Mr. Dockweiler: Well, your Honor——

The Court: I will allow it. It will be harmless on your argument of the law, if it is in error.

Mr. Montgomery: Yes.

Mr. Dockweiler: Then the objection will be overruled, saving an exception?

The Court: Yes; an exception.

Q. By Mr. Dockweiler: How many such pledgees were there? A. Three.

Q. Who were they?

A. The treasurer of the City of Anaheim, the treasurer of Orange County, and the Reconstruction Finance Corporation.

Q. And an aggregate of how many such bonds were pledged to the three pledgees, roughly? [148]

A. $90,000 par value.

Q. $90,000 out of a total of how many par value?

A. I did not total that.

Q. Well, I will withdraw the question because the document itself will reflect it, your Honor. Now, those pledges were by the bank or by the receiver?

A. By the bank prior to the receiver taking possession of the assets of the bank.

(Testimony of Roy De La Mare.)

Q. Yes. Do you know the circumstances of the pledging?

A. Not other than the pledge agreements, that the various treasurers and the Reconstruction Finance Corporation's copy of the bill payable document of the Anaheim First National Bank to the Reconstruction Finance Corporation.

Q. And those are in the files of the bank?

A. Yes, sir.

Q. And they were pledged to secure public deposits, were they?

A. The first two were pledged to secure public deposits, and the other one a loan that the bank obtained from the Reconstruction Finance Corporation.

Q. The fourth column will reflect what?

A. Who sold the bonds.

Q. Who sold the bonds, each and every one of the bonds listed there. That would show the sales by the pledgees, if any, would it not?

A. Yes. [149]

Q. And show sales by the bank itself during the course of administration prior to the receiver taking it over? A. Yes.

Q. And sales by the receiver under direction of the Comptroller? A. Yes, sir.

Q. Any other sales?

A. There are two items which represent payments by the liquidating committees of the issues.

Q. Oh, yes. And that is all that is covered by

(Testimony of Roy De La Mare.)

that fourth column, is that right? A. Yes sir.

Q. Then the fifth column will show what?

A. The date of the sale.

Q. The date of the sale on each and every one of those cases that you have referred to as sales?

A. That is right; yes, sir.

Q. Then the sixth column?

A. Proceeds of the sale.

Q. That is cash received?

A. Cash received.

Q. Or whatever consideration was received?

A. Yes, sir.

Q. And then in the seventh column?

A. It shows the book value of bonds as shown by the books of the bank on June the 24th, 1931.

[150]

Q. The book value as shown on June 24, 1931. Then the eighth column?

A. Shows any appreciation between the book value as shown by the books of the bank on June 24, 1931, and the proceeds of sale of the bonds.

Q. In other words, between June 24, 1931, and the date of sale? A. And the date of sale.

Q. Then the last column reflects what?

A. The depreciation between the book value of bonds on June 24, 1931, and the amount received at the sale, at the date of sale.

Q. Does this document represent all of the bonds in what I would call the bank portfolio or belonging to the bank on June 24, 1931? A. No, sir.

(Testimony of Roy De La Mare.)

Q. Have you another document with you that will give us an idea of any other bonds that there were at that time? A. Yes.

Q. Now, what is that?

A. The examiner's report.

Q. The examiner's report. What other bonds were there in addition to this list on——

For the purposes of identification, may we at this time ask for a number for identification?

The Clerk: Defendant's H for identification.

[151]

Mr. Dockweiler: The last question, Mr. Reporter.

(Question read by the reporter.)

Q. By Mr. Dockweiler (continuing): ——this document concerning which you have just testified and which has been marked for identification as Exhibit H.

A. It was $69,171.73 book value of bonds and $8,134.38 of U. S. Liberty Bonds and $51,000 U. S. Consols.

Q. That would make an aggregate of, roughly?

A. $128,000, approximately.

Q. $128,000 in addition to those listed on Exhibit H? A. That is correct.

Mr. Purpus: What were the $51,000, please?

Mr. Dockweiler: What?

Mr. Purpus: What were the $51,000, please?

A. U. S. Consols.

(Testimony of Roy De La Mare.)

Q. By Mr. Dockweiler: Why did you not list them on Exhibit H?

A. The bonds that I just testified to did not show any depreciation on June 24, 1931.

Q. They did not show any depreciation on June 24, 1931. What has become of those bonds that you just testified to, aggregating about $128,000 par value? That is par value or book value?

A. Book value.

Q. Book value. What has become of them?

A. The U. S. Consols were pledged to secure circulation [152] and have been liquidated to pay off the circulation.

Q. Pledged by whom? A. By the bank.

Q. Itself? A. Yes, sir.

Q. And paid off to secure liquidation?

A. To secure the circulation.

Q. To secure circulation. Paid off at par or paid off at the book value as—in any event, Mr. De La Mare, those were bonds that showed no depreciation on June 24, 1931? A. That is correct.

Q. So they are not taken into that account?

A. These bonds are not taken up as an asset by the receiver.

Q. I will ask you whether this Exhibit H will show that all the bonds there have been sold?

A. Yes; all the bonds that appear on this exhibit excepting two items.

Q. What are the two?

(Testimony of Roy De La Mare.)

A. $15,000 General Water Works and Electric Corporation—that is par value—and $5,000 par value F. & W. Grand Properties.

Q. Are they being held in the portfolio of the receiver?

A. The bonds themselves are; yes, sir.

Q. The bonds are. What was the value at June 24, 1931, of each of those? [153]

A. General Water Works and Electric Corporation, $15,000 par value had a book value of $14,287.50; $5,000 par value of F. & W. Grand Properties had a book value of $4,779.16.

Q. Those two, they are how many bonds?

A. $20,000 par value.

Q. $20,000 par value, having a book value on June 24, 1931, of what?

A. Approximately $19,000.

Q. $19,000; almost par, then? A. Yes, sir.

Q. $20,000 against $19,000. And those now have a value of—have you it listed there?

A. Those have no value.

Q. Have no value.

A. We have received payments from the liquidating committee. The bonds are nearly liquidated now, so far as liquidating is concerned.

Q. Then you will never get back $19,000?

A. No.

Q. How much has been paid by the liquidating committee on those bonds?

(Testimony of Roy De La Mare.)

A. On the General Water Works $15,000 par value—General Water Works and Electric Corporation, $1,775.25; and the $5,000 F. & W. Grand Properties $205.18.

Q. Is that just a single payment made with expectation [154] of a number of further payments?

A. The General Water Works was a single payment.

Q. Yes.

A. It is not expected that any further payments will be made.

Q. You say it is not?

A. It is not anticipated.

Q. How about the other?

A. The F. & W. Grand Properties was made in two payments. It is not anticipated that any further payments will be made.

Q. Otherwise, all the bonds that are on that list H have been disposed of? A. That is correct.

Q. And of all that list, how many bonds show any appreciation after June 24, 1931, in comparing June 24, 1931, figure with the figure at which they were sold?

Mr. Montgomery: I object to that question as immaterial and irrelevant and indefinite, because an appreciation might exist in the market value of the bonds which is not reflected in what the receiver got for them. If I understand the account correctly, he is asking for the appreciation that the receiver got or that the bank got in making the sale.

(Testimony of Roy De La Mare.)

Mr. Dockweiler: The appreciation, if any, realized on the sale.

Mr. Montgomery: On the sale, yes. I think that is immaterial. [155]

The Court: I will let him state it and exception noted.

Q. By Mr. Dockweiler: How many show any appreciation over the June 24, 1931, figure at the time of sale? A. Two items.

Q. Indicate the par value of them and what they were sold for and the appreciation.

A. Ten thousand American Beet Sugar 6's of '35.

Q. And sold for—that is the June 24, 1931, value? A. $8,932.51.

Q. And sold for?

A. $461.59 in excess of book value.

Q. In other words, there was an appreciation of $461.59 on that transaction?

A. That is correct.

Q. Then the next one?

A. $5,000 Associated Telephone & Telegraph 5½'s, '55.

Q. June, 1931?

A. June 24, 1931, $4,240.73.

Q. And sold?

A. For $194.03 in excess of book value of June 24, 1931.

(Testimony of Roy De La Mare.)

Q. Therefore, the appreciation on the bonds sold at an appreciated value is how much?

A. $655.62.

Q. $655.62. Have you also a total of the depreciations, the aggregate of depreciations on sales?

[156]

Mr. Montgomery: Well, I would object to that on the ground it is immaterial, irrelevant and incompetent.

The Court: I will allow him to state and exception shown.

A. The total depreciation between June 24, 1931, book value and the amount realized at the sale of bonds, eliminating the two that I have just referred to that had an appreciation?

Mr. Dockweiler: Yes.

A. Shows a depreciation of $137,058.67.

Q. And that was depreciation from a figure of approximately what as of June 24, 1931?

A. That question is difficult to answer, Mr. Dockweiler, because it also includes what exchanges were made in the bonds.

Q. Yes. Where bonds were exchanged what do the bank books reflect?

A. In most instances the bank reflected on its books the same book value for the bonds acquired as the bonds they were releasing in the exchange.

Q. In other words, it was a sort of "even-

(Testimony of Roy De La Mare.)

Stephen'' exchange so far as the bookkeeping was concerned?

A. Except in one or two instances.

Q. And were those material in those instances?

A. In one instance the bank substituted or exchanged $20,000 par American Commonwealth Power 5½'s at 53 which [157] were shown on their books on June 24, 1931, to be a book value of $19,300. They exchanged those for $20,000 Cities Service Company 5's at 50, and they entered those on their books in the bond account at $21,782.71, an increase of $2400.

Q. Any other such transaction?

A. They exchanged $5,000 National Public Service, which were shown on the books at a book value of $5,000, for $5,000 Central Public Service, which they entered on the books at a book value of $5,256.25.

Q. A difference of? A. $256.25.

Q. Any other such transactions?

A. They exchanged another $5,000 National Public Service, which was shown on their books at a book value of $5,000, for $8,000 Postal Telegraph & Cable Corporation 5's at 53, which they entered on their books at $5,251.05.

Q. A difference of? A. $251.05.

Q. $251.05? A. That is correct.

Q. Any other?

(Testimony of Roy De La Mare.)

A. $5,000 United American Utilities Co. 6's at 40, shown on the books at $6,465, were exchanged for $5,000 Utilities Power & Light Corporation 5's at 59, and entered on the books at $6,529.33. **[158]**

Q. What is the difference there, roughly?

A. $64.32.

Q. Are there any other exchanges?

A. $5,000 United Public Utilities Co. 5½'s at 47, shown on the books of the Bank at $4,887.50—that is, on June 24, 1931—which they exchanged for $5,000 International Telephone & Telegraph Corporation 4½'s at 39 were entered on the books at $5,236.82.

Q. A difference of?

A. Approximately $340.

Q. Yes. Any other transactions in the way of exchanges?

A. $5,000 Pacific Western Oil Co. 6½'s at 43, on the books of the Bank on June 24, 1931, at $4,862.50 were exchanged for $10,000 Denver, Rio Grande & Western Railroad 5's at 78, and entered on the books at $6,140.37.

Q. A difference of about? A. $1,310.

Q. Any other such?

A. $15,000 Power, Gas & Water Securities Corporation 5's at 48, carried on the books on June 24, 1931, at $14,850 were exchanged for $15,000 St. Louis & San Francisco Railway Co. 4½'s at 78, at the same book value, $14,850. Then later these same

(Testimony of Roy De La Mare.)

bonds were exchanged for $15,000 St. Louis & San Francisco Railway prior lien 4's at 50 and entered on the books at $15,451.61.

Q. Making a difference in that transaction of? [159]

A. Approximately $600.

Q. $600. Any other exchanges?

A. There were several other exchanges but they were all exchanged at even value.

Q. Yes.

A. The same bonds taken in were exchanged for the same book value.

Q. You have been testifying from the second of these two documents concerning bonds that were prepared at my suggestion, have you not?

A. That is correct.

Mr. Dockweiler: For the purposes of the record I shall ask at this time that that document be marked for identification.

The Clerk: Exhibit I for identification.

Q. By Mr. Dockweiler: Now, with reference to these exchanges were any of them made by the receiver? A. No.

Q. They were all made, then, during the course of the administration of the bank prior to receivership? A. Prior to receivership.

Q. With reference to the various sales made, Mr. De La Mare, are you able to give us a general idea of during what years the sales were made of

(Testimony of Roy De La Mare.)

these bonds that were in the bond account in June of 1931?

A. With the exception of two items the sales were all [160] made—practically all made in 1934 and 1935.

Q. In 1934 and 1935 during course of liquidation of the bank? A. That is correct.

Q. Upon direction of the Comptroller, I take it?

A. With the exception of the bonds that were pledged.

Q. That were sold by the pledgee?

A. By the pledgees.

Q. County or city?

A. And the Reconstruction Finance Corporation.

Q. And the Reconstruction Finance Corporation, under the pledge agreement? A. Yes, sir.

Q. And during what year were they sold?

A. 1934.

Q. 1934. Were they in pledge prior to June 24, 1931? In other words, had they already been pledged in June, 1931?

A. As to the Reconstruction Finance Corporation I can't answer without referring to the records.

Q. Yes. In any event, the pledges were made by the bank itself and not by the receivership?

A. Yes, sir.

(Testimony of Roy De La Mare.)

Q. Do you have any document which, having in mind the sales of these bonds that were in the portfolio on June 24, 1931, or that were acquired afterwards representing exchanges for bonds in the portfolio in the depreciated bond account— [161] have you any document which will reflect the bonds now on hand in the receivership?

A. It is on this.

Q. Exhibit I is that ? A. That is right.

Q. On Exhibit I. And from that, roughly how much in par value of such bonds are there?

A. $86,000.

Q. $86,000; represented by how many bonds, or how many kinds of bonds?

A. Nine different issues.

Q. Nine different issues. What was the aggregate book value of those issues on June 24, 1931?

A. $77,549.67.

Q. What is the present market value? And if so, what do you base the present market value on?

A. The present market value shown here is $16,590.

Q. A depreciation in value of how much?

A. $61,000.

Q. $61,000 of $77,000 and some odd, is that right?

A. Approximately. There is a few cents difference.

(Testimony of Roy De La Mare.)

Q. Now, you base the present market value upon what?

A. The quotations obtained from William Cavalier & Company, stock and bond brokers, this morning.

Q. This morning, reflecting yesterday's market value or the last quoted market value? [162]

A. The last quoted market value.

Q. And these bonds that are under the heading "Bonds on hand at July 20, 1937" on Exhibit I are bonds that actually were in the portfolio on June 24, 1931, are they not, or represent exchanges of bonds that were in that portfolio at that time?

A. That is correct.

Q. Then, as to most of these bonds listed on Exhibit H they were in the bank, either themselves or in the form of bonds for which the bank made exchanges itself, from June 24, 1931, until the receivership occurred, except for sales made by the bank itself and sales made by pledgees, is that right?

A. No. The sales made by the pledgees were made after the receivership.

Q. Oh, after the receivership. Then, only allowing for the few sales by the bank itself or exchanges, they were all in the portfolio from June, 1931, until January, 1934, is that right?

A. That is correct.

(Testimony of Roy De La Mare.)

Q. And some of those, those listed on Exhibit I under the heading "Bonds on hand July 20-1937" are still in the hands of the receiver?

A. They are in the hands of the Comptroller of the Currency.

Q. Or the Comptroller of the Currency, at a depreciated [163] figure of $60,000 under the $77,000 as of June, 1931?

A. Approximately $61,000.

Q. $61,000 depreciation; that is in book value?

A. Yes.

Mr. Dockweiler: I think that is all the cross examination.

Mr. Montgomery: Plaintiffs rest. Oh, I might ask for a stipulation. May we have a stipulation that suits have been filed to enforce the assessment against F. H. Dolan, L. J. Kelly and F. Kelly? Tuffree paid his assessment, as I remember it.

Mr. Dockweiler: Let me see. The stipulation goes to what, Mr. Montgomery? I want to be sure.

Mr. Montgomery: That suits have been filed against L. J. Kelly, F. H. Dolan and F. Kelly on the stockholders' liability.

Mr. Dockweiler: May I say to your Honor that I do not think that has any bearing upon the matter. It probably would be a harmless stipulation, but the cases are legion that the question of stockholders' liability is wholly distinct from any effort made to get contribution and so on.

(Testimony of Roy De La Mare.)

The Court: We have allowed a very wide range here, understanding, of course, that it resolves itself largely into a law question in the end, and if we decide the law right it won't make much difference about the immaterial matters that may have crept in. [164]

Mr. Dockweiler: If your Honor for the whole general record would like such a stipulation, I am willing to make a stipulation provided that opposing counsel will permit this addition to the stipulation: That with reference to the cases for stockholders' liability against F. H. Dolan, Ed Kelly and L. J. Kelly there has been filed a demurrer on the ground that each of those causes of action is barred by the statute of limitations, on the ground that the statute runs from the date of the levy by the Comptroller and not the date of the maturity of the demand to pay; and if their theory is correct on the demurrer, of course, those stockholders' liability cases will be decided adversely on the point of law to the Comptroller or receiver.

Mr. Montgomery: I think our point of law is good, too, your Honor. I will accept the stipulation.

Mr. Dockweiler: Thank you. That is entirely agreeable, then, to us.

Mr. Montgomery: James Tuffree, Jennie Pomeroy, and M. Del Giorgio have paid their assessments.

Mr. Chipkin: Mr. Del Giorgio testified that he did not pay it; that he gave a note for it.

(Testimony of Roy De La Mare.)

Mr. Montgomery: No. He gave a note for the other thing that is involved here.

Mr. Chipkin: Oh, yes.

Mr. Dockweiler: You have got Del Giorgio for one.

Mr. Montgomery: Tuffree. [165]

Mr. Dockweiler: Tuffree for another.

Mr. Montgomery: Jennie Pomeroy.

Mr. Dockweiler: Jennie Pomeroy.

Mr. Montgomery: Minnie Baxter.

Mr. Dockweiler: Minnie Baxter.

Mr. Montgomery: And Yungbluth.

Mr. Dockweiler: And Yungbluth. They all have paid.

Mr. De La Mare: Yes.

Mr. Dockweiler: All right. It will be so stipulated, although I say again, your Honor, that I do not think that is material in view of the law on the matter.

Mr. Montgomery: We rest. [166]

DEFENSE

Mr. Dockweiler: Mr. Waldron, please take the stand.

W. J. WALDRON,

called as a witness on behalf of defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. W. J. Waldron.

(Testimony of W. J. Waldron.)

Direct Examination

Q. By Mr. Dockweiler: Mr. Waldron, what is your occupation?

A. National Bank Examiner.

Q. Now you are a National Bank Examiner and have been such for how long?

A. With the exception of a period of four years, since 1922.

Q. Since 1922. Were you bank examiner for the district within which the Anaheim First National Bank is located at any time?

A. Yes; from the fall of 1930 until the present time.

Q. From the fall of 1930 until the present time. When did you first have anything to do with examining the Anaheim First National Bank?

A. I think in December, 1930.

Q. In December, 1930, succeeding who as examiner? [167] A. R. Foster Lamm.

Q. Mr. Lamm, who was on the stand yesterday?

A. Yes.

Q. After late 1930 and up until the closing of the Anaheim First National Bank do I understand that you were the bank examiner under the Comptroller with reference to that bank?

A. Yes, sir.

Q. And followed its affairs as such bank examiner? A. Yes.

Q. And made reports thereon to the bank and to the Comptroller? A. Yes.

(Testimony of W. J. Waldron.)

Q. Do you recall ever having discussed with the bank officials of the Anaheim First National Bank or any of its directors the matter of its condition of impaired capital? A. Yes.

Q. When did you start discussing it with them?

A. Well, I would say probably immediately after or during my examination of December, 1930.

Q. Yes. Was that the result of the disclosures of the examination? A. Yes.

Q. And at that time what did you recommend or inform these gentlemen, the officers of the bank, would have to be done with reference to the financial condition of the bank? [168]

A. As I recall it, as early as that, late in 1930, there had been a program that was still in process of possibly increasing the capital stock of the bank and selling the stock at a premium to take care of the depreciation in the bond account.

Q. Did that program go through?

A. The program did not go through.

Q. Was there any alternate program discussed or suggested?

A. As I recall it, either at the time of my examination of June, 1931, or possibly somewhat prior to that, I had a discussion with Mr. W. A. Dolan, president of the bank, regarding a plan he had for raising additional money by selling the bond depreciation.

Q. Now, when did you first have a discussion with him on that subject, as nearly as you can fix it?

(Testimony of W. J. Waldron.)

A. Well, though I don't particularly recall it, I think there must have been some discussion in my prior examination because a program had been originated prior to that examination along that line, and my report of December, 1930, reflected the program that had been put into effect at a prior date.

Q. The program already put into effect?

A. Already put into effect.

Q. And what program was that?

A. That was the raising of some $30,000 in the spring [169] or summer of 1930, represented by notes put in the bank's files.

Q. And that was to repair impaired capital?

A. Yes.

Q. Well, prior to discussing it with Mr. Dolan at the time you are now referring to did you discuss it with any other member or any other officer of the bank or director?

A. Well, undoubtedly I discussed it with Mr. Baxter who was an active officer in the bank. I doubt whether prior to June, 1931, I discussed it with any of the directors. I don't recall that I did.

Q. Do you remember whether Mr. Dolan told you precisely what the plan was, and did you say anything in reply to him?

A. Well, as I recall it, he told me that the plan was to collect $175 a share from as many of the stockholders as they could.

Q. Did he tell you how much they expected to realize from that?

(Testimony of W. J. Waldron.)

A. In the neighborhood of $115,000, as I recall it.

Q. Did he say how it was going to be raised, through what means?

A. Well, it would be in the nature of a voluntary payment, but along the line of a purchase of bond depreciation.

Mr. Montgomery: I think we should strike that "it would be in the nature of a voluntary payment" as a mere conclusion. [170]

The Court: Yes; it may be stricken. You will have to say what was said about it.

Mr. Dockweiler: Yes. If he used any particular words, you can use those, or the substance of his words, Mr. Waldron.

A. The substance of his words were that the funds to be raised were to be used to purchase the bond depreciation.

Q. Did he state who originated that plan?

A. Yes.

Q. Who did he say originated the plan?

A. Mr. Lamm.

Q. As a bank examiner of the experience you have had, had you ever heard of that method of curing impaired capital?

A. No; that was my first knowledge of it.

Q. Never with reference to any other national bank have you heard it? A. No.

Q. Did you say anything with reference to that as a feasible plant?

(Testimony of W. J. Waldron.)

A. I said that it might—essentially, that it might be possible; but that it also might be open to attack by the Comptroller's office.

Q. Did anything occur after that? Was there any further development or discussion of that problem that you recall, Mr. Waldron?

A. There was a rather continual discussion from the time of my examination in June, '31, up through the time that the [171] money was actually paid in, some time late in July, as I recall it.

Q. Yes.

A. Until it was finally put on the bank's books.

Q. Do you know whether all the money was paid in cash? A. It was not—not at that time.

Q. And the payments were spread out over a period, I take it?

A. The notes, as I recall it, 90-day notes were taken from certain of the contributors.

Q. Did you ever attend a directors' meeting at which this was discussed, and by directors' meeting I mean a formally gathered meeting where the gentlemen were all together in one room?

A. As I recall it, I think perhaps at my request a directors' meeting was held some time around the middle of July of 1931 which I think I attended.

Q. Which is the middle of July, 1931. Do you remember the discussion at that meeting? In other words, do you remember what was said?

A. Well, a considerable part of the money, or possibly all of the money that was eventually raised

(Testimony of W. J. Waldron.)

had been raised at that time. The matter of how the bookkeeping would be arranged, I recall that I was very insistent that if this plan of purchase of bond depreciation would go over, there must be a very definite method of bookkeeping as to the [172] particular bonds, the depreciation in the particular bonds that were purchased; and if there was any exchange, that the record follow clearly through, if there was any break in the record, and certainly if otherwise they could recover their money, they would not be able to unless they kept a very clear record.

Q. Did they ever keep any such record?

A. I think not on the official books of the bank. Whether they did by memorandum or not, I am not sure.

Q. Of course, you examined the bank at intervals thereafter, regular intervals? A. Yes, sir.

Q. How frequently?

A. Approximately once in six months.

Q. Once in six months thereafter. So far as you recall, they kept no set of books, that is, among the bank books?

A. I think not. They kept the record.

Q. Now, for any such plan did you ever receive any approval of this method of buying the bond depreciation? A. No.

Q. Did you ever receive any approval of it from the Comptroller's office in Washington?

A. No.

(Testimony of W. J. Waldron.)

Q. Or from any superior officer? A. No.

Q. Did you ever represent to these or ever tell any of [173] these officers or directors or anybody connected with the bank that this plan was approved by the Comptroller or would be agreeable to the Comptroller? A. No.

Mr. Dockweiler: Well, I think that is all from Mr. Waldron.

Mr. Montgomery: No cross examination.

Mr. Dockweiler: Thank you. May Mr. Waldron be excused?

Mr. Montgomery: Yes; he may.

Mr. Dockweiler: Now, I should like to call on the substantive defense Mr. De La Mare again.

[174]

ROY DE LA MARE,

recalled as a witness on behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Dockweiler: Mr. De La Mare, I want to ask you just one question—I hope it will be one question. Did this bank, so far as any records that the receiver has taken possession of and those in your charge—did the bank ever keep a record and an accounting of the depreciated bonds, or any group of depreciated bonds after June 24, 1931?

(Testimony of Roy De La Mare.)

Mr. Montgomery: I object to that as immaterial.

The Court: He may state what the records show.

Q. By Mr. Dockweiler: What do the records show, if you have knowledge of the records?

A. There is no record that we have found in the bank—that I have found in the records of the bank that would so indicate that there was any segregation made by anyone. The bond account was kept just the same before June 24, 1931, as it was afterwards.

Q. Were any lists made each six months or at other stated periods thereafter?

A. I found no record to that effect.

Mr. Montgomery: I object to that as immaterial.

Q. By Mr. Dockweiler: Now, was there any liability set up in the bank records—pardon me, I should not ask [175] another question until there is a ruling on this.

The Court: He has answered. Let it remain.

Mr. Dockweiler: I would say, your Honor, in defense of the question that it is predicated upon language used in this June 24th arrangement.

Mr. Montgomery: I may say in support of my objection that if the bank violated its agreement that does not relieve the receiver or the bank of responsibility.

The Court: Let it stand and exception shown. It has been answered.

Mr. Dockweiler: Now, the second question that I asked?

(Testimony of Roy De La Mare.)

(Pending question read by the reporter.)

Q. (Continuing) In connection with the depreciated bonds after June 24, 1931, different from the account prior to June 24, 1931? A. No, sir.

Q. At any time after?

A. Not that I found in the records of the bank.

Q. In other words, the way of carrying the books subsequent to June 24, 1931, was the same continuously as it had been prior to June 24th?

A. That is correct.

Q. So far as the records now in the possession of the receiver are concerned?

A. That is correct.

Q. And you assume that those records are all the records [176] of the bank? A. Yes, sir.

Mr. Dockweiler: That is all.

Mr. Montgomery: No cross.

Mr. Dockweiler: May it be stipulated that Mr. Hogan would testify that there were no records obtained by him that would reflect other than what Mr. De La Mare has just testified to? In other words, that on that particular point Mr. Hogan——

Mr. Montgomery: Subject to our objection, we so stipulate.

The Court: Yes.

Mr. Dockweiler: In other words, he would testify substantially the same as Mr. De La Mare has

with reference to the matter on which Mr. De La Mare was just on the stand.

Mr. Montgomery: Yes.

Mr. Dockweiler: Thank you. One other thing I would like for the purposes of the record.

Mr. Montgomery: There is this exception: That the agreement was kept in the records.

Mr. Dockweiler: The agreement was kept in the records, was it?

Mr. Montgomery: Where did you get it?

Mr. Hogan: It was found in the bank files.

Mr. Montgomery: That is what we say.

Mr. Dockweiler: It will be stipulated that this Exhibit [177] A was found in the bank records at the time the bank was taken over by the receiver.

For the purposes of the records, your Honor, it seems to me we should have one other minute account introduced. We have the two letters, I find, but not the minutes, and heretofore we have entered both the minutes and the letters of the Comptroller and the president of the bank. Just for the purposes of connecting up the record I think probably they should be in.

Mr. Montgomery: Well, except——

Mr. Dockweiler: You see, we have introduced those letters.

Mr. Montgomery: Yes; that is right. All right.

Mr. Dockweiler: Then defendant offers as Defendants' Exhibit No. J a copy of the minutes of the directors' meeting of September 17, 1931, it being stipulated that a copy may be introduced, rather than the matter otherwise proven up.

Mr. Montgomery: So stipulated.

Mr. Dockweiler: With the full force and effect of full proof.

DEFENDANT'S EXHIBIT J

MINUTE RECORD

Meeting Held on the 17th Day of September, 1931

The regular monthly meeting of the Board of Directors of the Anaheim First National Bank was held on the above date, President Wm. A. Dolan presiding.

Directors present were:

Wm. A. Dolan
L. J. Kelly
Frank Baum
Ed Kelly
Ernest F. Ganahl
Ben Baxter
F. H. Dolan
J. H. Brunworth
F. C. Rimpau
J. J. Dwyer
S. James Tuffree

Minutes of the last regular meeting were read and approved.

Loans from No. 6309 to 6377 were read and on motion by L. J. Kelly, seconded by J. H. Brunworth, were approved.

On motion by Fred C. Rimpau, seconded by Frank Baum, expense items for the month ending with the date of this meeting were approved.

A letter from the Treasury Department dated Aug. 20th and Mr. Dolan's reply thereto dated September 8th were read and ordered filed.

Adjournment,

WM. A. DOLAN,
President.

ROSS L. PHEGLEY,
Secretary.

Then, your Honor, at this time defendant offers formally as Exhibits H and I the two documents heretofore marked for identification as Nos. H and I.

Mr. Montgomery: I would object to those as needlessly encumbering the record. If they could be introduced as [178] physical exhibits it might not be so bad, but there is a lot of immaterial matter here.

The Court: As illustrative of the witness' testimony, they may be considered; and if you can select such portions of them as you deem material—you say there are immaterial matters that you want to cut out——

Mr. Dockweiler: It makes a composite whole. If your Honor would want to look over them, it would be difficult otherwise.

Mr. Montgomery: The point I make is, we would not want to copy this whole thing into the record.

The Court: Oh, no.

Mr. Dockweiler: No, no. As a physical record, without the necessity of the reporter copying it in.

The Court: Yes; it is so understood.

	Par Value	Description	Book Value June 24, 1931	Book Value July 20, 1931 After Applying Contribution	October 21, 1932 Part of Contribution Allocated	December 16, 1932 Part of Contribution Allocated	Book Value After Partial Allocation of Contribution	Proceeds of Sales Prior to Suspension	Proceeds of Sales by Receiver	Exchanges	Market Value of Securities Still on Hand	Interest Collected	Interest Accrued to October 18, 1934 but Not Collected
		Securities Received for Exchanges Listed Above	Amount Charged to Bond Account										
(1)	20,000	Cities Service Co. 5-50	21,782.71								7,950.00	2,938.89	380.82
(2)	5,000	Associated Tel. & Tel. 5½-55	4,240.73								2,737.50	412.50	128.08
(3)	5,000	Central Public Service 5½-49	5,256.25								25.00	296.39	608.77
(4)	8,000	Postal Telegraph & Cable Corp'n 5-53	5,251.05								3,360.00	1,000.00	119.45
(5)	15,000	St. Louis & San Francisco Ry. 4½-78	14,850.00							(18) 14,850.00		675.00	
(6)	5,000	McKesson Robbins Co. 5½-50	4,950.00							(19) 4,950.00			
(7)	10,000	Associated Gas & Elect. Co. 5-50	9,000.00								1,725.00	1,000.00	106.85
(8)	5,000	Associated Tel. Utilities 5½-44	6,865.00								750.00	372.78	539.45
(9)	10,000	Alleghany Corp'n 5-49	10,000.00								5,700.00	1,000.00	190.41
(10)	5,000	Utilities Power Light Corp'n 5-59	6,529.33								1,275.00	766.12	53.42
(11)	5,000	International Tel. & Tel. 4½-39	5,236.82								3,150.00	337.50	67.19
(12)	5,000	International Tel. & Tel. 4½-52	4,887.50								2,712.50	450.00	67.19
(13)	5,000	New England Gas & Elect. Corp'n 5-50	4,794.18								2,875.00	500.00	116.44
(14)	3,000	New York, Ontario & Western R. R. 4-55	3,000.00								1,620.00	360.00	45.70
(15)	2,000	New York, Ontario & Western R. R. 4-92	2,000.00								1,292.50	243.11	10.30
(16)	5,000	New York Susquehanna & Western R. R. 5-40	5,000.00								2,350.00	776.39	53.42
(17)	10,000	Denver Rio Grande & Western R. R. 5-78	6,148.37								2,050.00	750.00	273.29
(18)	15,000	St. Louis San Francisco Ry. prior liens 4-50	15,451.61								2,025.00		1,006.85
(19)	5,000	Associated Tel. & Tel. 5½-55	4,950.00								2,737.50	412.50	128.08
			140,193.55		48,678.09	28,936.87		3,377.35	37,545.00	134,902.41	58,457.50	30,365.96	18,012.82

Summary Analysis

Contribution allocated October 21-1932	48,678.09
" " December 16-1932	28,936.87
" Unallocated at Receivership	33,035.04
Total Contribution applied to bond account	110,650.00

Book value of bonds on which contribution to cover depreciation was made		312,279.84
Less book value of bonds exchanged for other issues		134,902.41
		177,377.43
Plus amounts set up in bond account for bonds acquired in exchanges shown above		140,193.55
		317,570.98
Portion of Contribution credited to Bond account without allocation		110,650.00
Book value of bonds after credit for contribution		206,920.98
Sales prior to suspension	3,377.35	
Sales by Receiver	37,545.00	
Present market value of remaining bonds	58,457.50	
Less credit for sales and market value as shown above		99,379.85
Further depreciation or loss		107,541.13

Bonds on hand July 20, 1937

Par Value	Description	Book Value 6-24-31	Present Market Value
21,000	American Natural Gas 6½-42	20,827.50	—
5,000	Republic of Bolivia 7-58	3,612.50	400.00
15,000	Consolidated Gas Utilities 6½-43	12,722.19	2,925.00
5,000	Dept. of Cundinamarca 6½-59	4,662.50	700.00
8,000	Standard Telephone 5½-43	7,600.00	5,440.00
5,000	St. Louis Gas & Coke Corp'n 6-47	4,525.00	700.00
10,000	Denver Rio Grande & West. R. R. 5-78	6,147.37	2,250.00
2,000	N. Y. Ontario & West. R. R. 4-92	2,000.00	425.00
15,000	St. Louis San Francisco Ry. Series A 4-50	15,451.61	3,750.00
$86,000.00		$77,549.67	16,590.00

[Endorsed]: Defendants' Exhibit I. Filed July 21, 1937.

DEFENDANTS' EXHIBIT 1

Anaheim First National Bank, Anaheim, California

Securities involved in transaction whereby certain Stockholders contributed $115,650.00 to purchase bond depreciation.

Par Value	Description	Book Value June 24, 1931	Book Value July 20, 1931 After Applying Contribution	October 21, 1932 Part of Contribution Allocated	December 16, 1932 Part of Contribution Allocated	Book Value After Partial Allocation of Contribution	Proceeds of Sales Prior to Suspension	Proceeds of Sales by Receiver	Exchanges	Market Value of Securities Still on Hand	Interest Collected	Interest Accrued to October 18, 1934 but Not Collected
20,000	Merced Irrigation District 5½-65	10,000.00						4,671.20			5,172.44	
41,000	" " " 6-45/60	33,191.75						10,043.80				
10,000	Oakdale " " 5-40	10,260.00						2,900.00			374.98	
9,000	Waterford " " 6-38/39	9,299.70						2,655.00			270.00	
20,000	American Commonwealth Power 5½-53	19,300.00							① 19,300.00		155.84	
21,000	American Natural Gas Corp'n 6½-42	20,827.50		20,512.50		315.00				52.50		4,842.94
5,000	Associated Electric Co. 4½-53	4,700.00								1,787.50	675.00	67.19
10,000	Associated Public Utilities Co. 5-47	9,100.00								4,575.00	1,500.00	149.31
20,000	Consolidated Gas Utilities Co. 6½-43	16,962.94			12,010.21	4,952.73			② 4,240.73	937.50	1,300.00	2,482.45
15,000	General Water Works & Elect. Corp'n 6-44	14,287.50			12,547.50	1,740.00				1,650.00	900.00	2,293.15
10,000	National Public Service Co. 5-78	10,000.00							③ 5,000.00		125.00	
									④ 5,000.00			
20,000	Power Gas & Water Securities Corp'n 5-48	19,800.00							⑤ 14,850.00		625.00	
									⑥ 4,950.00			
10,000	Rochester Central Power Corp'n 5-53	9,000.00							⑦ 9,000.00		208.33	
5,000	Republic Gas Corp'n 6-45	6,865.00							⑧ 6,865.00			
8,000	Standard Telephone Co. 5½	7,600.00								1,920.00	660.00	864.33
15,000	St. Louis Gas & Coke Corp'n 6-47	14,525.00							⑨ 10,000.00	250.00	1,050.00	563.84
5,000	United American Utilities Co. 6-40	6,465.00							⑩ 6,465.00			
									⑪ 4,887.50			
10,000	United Public Utilities Co. 5½-47	9,775.00							⑫ 4,887.50		551.25	
5,000	Berlin City Electric 6-55	4,462.50						1,812.50			717.67	
5,000	Berlin City Extension 6-58	4,784.16						1,725.00			600.00	
10,000	Chile Railway 6-61	7,657.94		5,262.94		2,395.00	2,095.00	712.50				
5,000	Rio Grande du Sul 6-68	3,637.50		3,287.50		350.00		12,500.00				
5,000	City of Rome 6½-52	4,794.18							⑬ 4,794.18		325.00	
5,000	City of Sao Paulo 6-68	3,690.00		3,190.00		500.00		1,150.00				
5,000	Department of Cundinamarca 6½-59	4,662.50								700.00	261.10	865.27
10,000	American Beet Sugar 6-35	8,932.51						9,425.00			1,890.67	
5,000	F. & W. Grand Properties, Inc. 6-48	4,779.16			4,379.16	400.00				1,950.00	150.00	852.33
10,000	Lautaro Nitrate Co. 6-54	9,475.00		9,275.00		200.00		1,200.00				
									⑭ 2,000.00			
10,000	Louisiana & Arkansas Ry. 5-69	10,000.00							⑮ 3,000.00		237.50	
									⑯ 5,000.00			
5,000	Pacific Western Oil Co. 6½-43	4,862.50							⑰ 4,862.50		325.00	
5,000	Pacific Steamship Co. 6½-33	4,970.00		3,687.65		1,282.35	1,282.35					
5,000	Republic of Bolivia 7-58	3,612.50		3,462.50		150.00				300.00		1,136.30
		312,279.84										

Contribution of $110,650.00 by Stockholders, to bond account without allocation July 20, 1931.

Mr. Dockweiler: And just one other thing that I want to ask, probably that can be introduced by way of stipulation, and that is the minute record of the annual meeting of stockholders of January 12, 1932. And I will state frankly the reason for the request, and it is this: That there is a general motion presented by Mr. Dolan and seconded by Mr. Kelly that all and singular actions of the officers of the bank for the past year be and they are hereby ratified, confirmed and approved, which motion was carried.

Mr. Montgomery: Well, that would be immaterial, your Honor. [179]

Mr. Dockweiler: With reference to the stockholders it might be of some materiality, your Honor.

Mr. Montgomery: For a subsequent time involved, 1932, and the contribution was made in 1931, six months prior thereto; and there is no showing here that the stockholders in question, I mean who have brought these suits, were present. It simply says there were 391 shares, 245 shares being represented by proxy. Now, Miss Baxter does not show on the record to have been present, nor her mother, nor Del Giorgio.

Mr. Dockweiler: Well, it seems to me in respect of the transactions of a national bank, which is in a peculiar position with reference to third parties creditors, parties to whom representations are held out as to financial security, that these resolutions are of some significance, your Honor—more so than they would be in the case of private corporations

that are not vested with the peculiar fiduciary capacity of a national bank.

The Court: I am very doubtful about it. It may be filed, subject to the objection and exception, and the record may show, if counsel desires, a motion to strike is made now.

Mr. Montgomery: Yes, your Honor.

The Court: And that is submitted.

Mr. Montgomery: I think that their stockholders' meeting—may I look at that there?

The Clerk: That is Exhibit K. [180]

DEFENDANT'S EXHIBIT K

MINUTE RECORD

Meeting Held on the 12th Day of January, 1932

ANNUAL MEETING OF STOCKHOLDERS

The regular annual meeting of the stockholders of the Anaheim National Bank was held on the above date, in conformance with Section One of the By-Laws.

The meeting was called to order by Wm. A. Dolan and on motion by Frank Baum, seconded by J. H. Brunworth, J. J. Dwyer was chosen to act as chairman and on motion by L. J. Kelly, seconded by Frank Baum, Ross L. Phegley was chosen to act as secretary.

The secretary called the roll and it was ascertained that stockholders were present owing and holding 391 shares and 245 shares were represented by proxy. The number being sufficient to constitute

a quorum the chairman declared the meeting open for the election of a Board of Directors for the ensuing year and for the transaction of such other business as might properly come before the meeting.

Minutes of the stockholders' meeting of January 13th, 1931, were read and approved.

On motion by Wm. A. Dolan, seconded by L. J. Kelly, it was resolved: That all and singular actions of the officers of the bank for the past year be and they are hereby ratified, confirmed and approved. Carried.

Moved by Wm. A. Dolan that Board of Directors be reduced from fifteen to eleven. Seconded by Frank Baum and carried.

The following were nominated to serve as Directors for the ensuing year:

J. J. Dwyer
Wm. A. Dolan
S. James Tuffree
Ed Kelly
J. H. Brunworth
L. J. Kelly
Frank Baum
F. C. Rimpau
J. W. Truxaw
Ben Baxter
F. H. Dolan

Moved by J. H. Brunworth, seconded by Ed Kelly, that nominations be closed. Carried.

Moved by L. J. Kelly, seconded by Ben Baxter, and carried, that the By-Laws pertaining to the

election of Directors be hereby suspended and that the secretary be hereby instructed to cast the entire ballot for the nominees. The secretary thereupon cast the ballot as directed and the nominees were declared elected.

There being no further business to be acted upon, on motion the meeting adjourned.

WM. A. DOLAN,
President.
ROSS L. PHEGLEY,
Secretary.

Mr. Montgomery: I think that is also objectionable as being subsequent. However, I take it that your Honor is receiving these items of evidence to sift them out hereafter.

The Court: Yes.

Mr. Montgomery: As to what really bears on it and what does not.

The Court: I will consider any objection that you may point out to any matter when introduced.

Mr. Montgomery: I might make the motion at this time to strike all immaterial matter, so it can be submitted; and, of course, in making findings, why, I think it will clear up what has been considered and accepted more than anything else.

The Court: Well, I would not want an omnibus motion of that sort; that is, your motion to strike ought to be specific, as directed to certain things.

Mr. Montgomery: I might make a motion to

strike those matters of evidence to which I have heretofore objected and that have been received.

The Court: You may put it in that form, then.

Mr. Dockweiler: Just before we close, may I ask to look at the records, that is, the exhibits? One further thing, your Honor: We should like at this time—and I think it can be done by stipulation—to introduce a report of the condition of the Anaheim First National Bank at the close of business on **June 30, 1931, purporting** to be signed by [181] Phegley, cashier, and by three of the directors in the ordinary form required by reports, quarterly reports I think they are on national banks.

Mr. Montgomery: For what purpose?

Mr. Dockweiler: The purpose of which is to show that the bonds were carried as an asset.

Mr. Montgomery: I don't care to have this whole report go in for that one item.

Mr. Dockweiler: May it then be stipulated that a report of the condition of Anaheim First National Bank as of the close of business June 30, 1931, was duly prepared and filed by the bank with the Comptroller's office, showing United States government securities owned under resources of the bank in the total sum of $59,349.38 and "other bonds, stocks and securities owned" under resources at $387,389.80?

Mr. Montgomery: As far as material, that stipulation is accepted.

The Court: Very well.

Mr. Dockweiler: Yes. And that this sum of three hundred eighty-seven and some odd thousand dollars refers only to bonds?

Mr. Montgomery: Yes. Yes; that is right.

Mr. Dockweiler: The defendant closes, your Honor.

Mr. Montgomery: We have no rebuttal, so we also rest. How would your Honor like to handle this?

The Court: I will accommodate myself to your plans. [182]

Mr. Montgomery: My suggestion is that there is a good deal of testimony and evidence in here which perhaps should be studied, and if we could have time to file briefs, I think the fact issues are so comparatively simple that it would not be necessary to——

The Court: Mr. De La Mare's testimony, do your exhibits show the figures that he gave and the classifications of the items?

Mr. Montgomery: I think they do, your Honor.

Mr. Dockweiler: I think your Honor will find that they do.

The Court: I was going to say, if they did not I was going to ask to have his testimony written out. I have quite full notes on most of it.

Mr. Montgomery: Then, if your Honor would say 20, 20 and 10?

The Court: Yes; you might as well.

Mr. Dockweiler: I wonder, your Honor, if it would not be simpler for your Honor to hear some

oral argument on the matter. The cases, I think it will be frankly admitted, are relatively few.

The Court: I am willing to if you want.

Mr. Dockweiler: I would prefer to argue it orally if I may.

Mr. Montgomery: All right; we will let them argue, then.

Mr. Chipkin: As far as the facts are concerned.

[183]

Mr. Montgomery: But I want to analyze the proposition afterwards, so opening argument waived. Have we got it now entered so I do not have to take it up, that we have 20, 20 and 10?

The Court: Oh, yes; that may be understood.

(Oral argument of counsel not transcribed.)

[184]

I hereby certify that on the 20th and 21st days of July, 1937, I was the duly appointed and acting shorthand reporter in the United States District Court for the Southern District of California, Central Division, before the Hon. William P. James, and that as such reporter I took down in shorthand writing the proceedings had on those days in the cause entitled L. J. Kelly, et al., Plaintiffs, vs. Anaheim First National Bank, etc., et al., Defendants, being numbered Law No. 7522-J; that thereafter I caused to be transcribed into typewriting under my supervision and direction my shorthand notes of said proceedings.

I certify that the foregoing pages numbered from 1 to 184, both inclusive, are a full, true and correct transcript of my shorthand notes so taken down as aforesaid, and that the same is a full, true and correct transcript of said proceedings hereinabove mentioned.

Dated this 25th day of May, 1939.

A. H. BARGION

[Endorsed]: Filed Oct. 17, 1938.

[Endorsed]: No. 9020. United States Circuit Court of Appeals for the Ninth Circuit. L. F. Kelly, F. H. Dolan, et al., Appellants, vs. Anaheim First National Bank, a National Banking Association, and J. V. Hogan, Receiver, Appellees. Supplemental Transcript of Record (Reporter's Transcript and Exhibits). Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 27, 1939.

PAUL P. O'BRIEN,

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9020

L. J. KELLY, F. H. DOLAN, BEN BAXTER, et al.,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association, et al.,

Appellee.

DESIGNATIONS FOR SUPPLEMENTAL TRANSCRIPT OF RECORD

Come Now, the Appellants, and, pursuant to that certain order made by this Honorable Court in this Cause on the 10th day of May, 1939, designate all of the Reporter's Transcript of Testimony and Proceedings on Trial, pages 1 to 184 (all inclusive) thereof, together with the Reporter's Transcript of Copies of Plaintiffs' Exhibits 1, 2, 3, 4, and Defendants' Exhibits A, B, C, D, E, F, G, H, I, J, K, pages 1 to 31 (all inclusive) thereof, all of which may, and shall be, printed as the Supplemental Transcript of Record in this Cause. This, together with the original Transcript of the Record now on file in this Cause, to constitute the Transcript of Record on Appeal.

Dated: June 1, 1939.

EDW. C. PURPUS,
By [Signature Illegible]
Attorney for Appellants.

POSTAL TELEGRAM

SB1002 44 NL 1939 Jun 1 PM 8 36

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Paul P. O'Brien, Clerk U. S. Circuit Court of Appeals

Post Office Building San Fran 1068

Re case of Kelly versus Anaheim First National Bank. As attorneys for Appellee we consent to the printing of whole of Reporter's Transcripts of Testimony and Proceedings on Trial and of plaintiffs' and defendant's exhibits, same to be used as Supplemental Transcript of Record.

DOCKWEILER & DOCKWEILER

[Endorsed]: Filed June 2, 1939. Paul P. O'Brien, Clerk.

No. 9020

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' BRIEF.

EDW. C. PURPUS,
430 L. A. Stock Exchange Office Building, Los Angeles,
Attorney for Appellants.

Parker & Baird Company, Law Printers, Los Angeles.

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No. 9020

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' BRIEF.

(Note: Herein for the sake of brevity, we shall refer to L. J. Kelly,, F. H. Dolan, Ben Baxter, S. James Tuffree, Ed Kelly, F. A. Yungbluth, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw and J. J. Dwyer, as the appellants; to the Anaheim First National Bank, a national banking association, as "The Bank;" and to J. V. Hogan, Receiver of the Anaheim First National Bank, a national banking association, as "The Receiver.")

Jurisdictional Statement.

This action was instituted by the appellants as plaintiffs against the appellee as defendant in the Superior Court of the state of California in and for the county of Orange [R. 4] and was filed in said Superior Court on the 11th day of January, 1936 [R. 35]. Thereafter on the 15th day of February, 1936 [R. 40] the receiver herein filed petition for removal of cause to the United States District Court, Southern District of California, Central Division [R. 36] under Judicial Code, section 24, sub-section 16 (U. S. C. A., Title 28, Section 41, Sub-section 16) and Judicial Code, sections 28 and 29 (U. S. C. A., Title 28, Sections 71-72) [R. 38]. Notice of removal [R. 41] having been given, and bond filed [R. 42], the Court made the order of removal to the District Court of the United States, Southern District of California, Central Division [R. 45], and a motion to remand [R. 47] was made and denied [R. 47]. This action was brought by the appellants as plaintiffs against the Bank to recover the following amounts, to-wit:

(a) For appellant, L. J. Kelly, the sum of $4,900.00 [R. 33];

(b) For appellant, F. H. Dolan, the sum of $32,500.00 [R. 33];

(c) For appellant, Ben Baxter, the sum of $1,750.00 [R. 33];

(d) For appellant, S. James Tuffree, the sum of $3,500.00 [R. 33];

(e) For appellant, Ed Kelly, the sum of $9,000.00 [R. 33];

(f) For appellant, F. A. Yungbluth, the sum of $1,750.00 [R. 33];

(g) For appellant, Minnie Palmer, formerly known as Minnie Baxter, the sum of $3,850.00 [R. 33];

(h) For appellant, M. Del Giorgio, the sum of $875.00 [R. 34];

(i) For appellant, Jennie Pomeroy, the sum of $3,500.00 [R. 34];

(j) For appellant, J. W. Truxaw, the sum of $1,750.00 [R. 34];

(k) For appellant, J. J. Dwyer, the sum of $1,750.00 [R. 34];

(l) For plaintiff, M. E. Day, the sum of $875.00 [R. 34];

(m) For plaintiff, Ernest F. Ganahl, the sum of $1,750.00 [R. 34];

(n) For plaintiffs, Frank Baum and Josephine Baum, the sum of $5,250.00 [R. 34];

(o) For interest on each and all of the aforesaid amounts at the rate of 7% per annum from January 15, 1934; and for the redelivery and cancellation of all notes and trust deed received from the plaintiffs alleged to have been given to the bank and that the lien created by any such instruments on any of the property enumerated [R. 22-24] be cancelled and that the bank cause a satisfaction of any liens theretofore given by plaintiffs upon the matter therein litigated to be recorded [R. 34] and for plaintiffs' costs of suit and for such other relief as to the Court might seem meet and proper [R. 34].

The answer of defendant, Anaheim First National Bank, a national banking corporation, by and through J. V.

Hogan, Receiver of said Anaheim First National Bank, a national banking corporation, was filed [R. 50]. The answer admits that the depreciation in the bond account plead in the complaint existed on or about June 18, 1936; admits that the claims made in the complaint were duly presented to the Receiver according to law and admits that the claims were not paid. The only issue taken is a denial that the plaintiffs and appellants entered into a lawful agreement with the bank whereby they, and each of them, agreed to purchase from said bank the depreciation then existing in said bond account. Thereafter, dismissal of Frank Baum and Josephine Baum was filed on June 5, 1937 [R. 77] and order re withdrawal of Frank Baum and Josephine Baum as parties plaintiff was entered and recorded June 5, 1937 [R. 76]. On August 13, 1938, a stipulation was filed as to a severance of Ernest F. Ganahl from said action and that his appeal might be dismissed as to him only [R. 159] and order granting severance of Ernest F. Ganahl to appeal was signed by William P. James, United States District Judge, and entered on August 13, 1938 [R. 160]. Since a time prior to the commencement of this action, the plaintiff F. K. Day has been dead [R. 84] and M. E. Day succeeded to all his right, title and interest herein sued upon, and the said plaintiff, M. E. Day, is now the owner and holder thereof [R. 4-5]. Thereafter, the cause proceeded to trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable William P. James, judge presiding, sitting without a jury, a jury trial having been duly waived by the respective parties to said action, on July 20 and 21, 1937 [R. 92]. Findings of fact and conclusions of law were signed by the said William P. James, judge of said District Court on February 28, 1938, filed March 2, 1938 [R. 91], and

judgment in favor of the appellee and against the appellants was entered and recorded March 2, 1938 [R. 93]. Motion for new trial was duly noticed for hearing on the 25th day of April, 1938 [R. 99-100] and the Court on May 13, 1938, caused his minute order to be entered denying plaintiffs motion for new trial [R. 101]. This appeal is prosecuted from the judgment of the District Court of the United States under the authority of U. S. C., Title 28, section 225, sub-section (a) (Judicial Code—Amended).

Statement.

On or about the 18th day of June, 1931, the bank was a national banking association organized and existing under the statutes of the United States known as the National Banking Act, which at all times had its place of business at Anaheim, Orange county, state of California [R. 5]. That on or about the 18th day of June, 1931, the regular monthly meeting of the Board of Directors of the bank was held and it was then moved by Ben Baxter (one of the appellants herein), seconded by F. H. Dolan (another one of the appellants herein) and carried that a committee be selected to collect $175.00 per share from stockholders to be used to purchase depreciation in bond account [R. 118-119]. On or about the 17th day of July, 1931, the regular meeting of the Board of Directors of the bank was held [R. 120] and it was resolved that $115,650, which had been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, together with certain other proceeds held on the books of the bank on reserve account, be applied to take up five notes of $6,000.00 each, as formerly placed in the bank's assets by certain stockholders on account of bond

depreciation; the balance of the said amount was to be applied directly against the bond account of the bank on account of estimated depreciation reducing the then total of bond account by $110,650. It was further resolved that as further payments were received from stockholders on account of the purchase of bond depreciation, that such sums should be applied on the bond account as above specified [R. 120].

The intended purpose of the purchase of the bond account was embodied in Plaintiffs' Exhibit 4, which reads in part as follows:

> "It is the intention that interest received from bonds equalling the amount of depreciation purchased be set aside for the use of the undersigned. An appraisal of the bond lease shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro rata among the stockholders purchasing depreciation of bond account." [R. 121.]

In compliance with the action of the Board of Directors taken at the meeting on June 18, 1931 [R. 118-119-120] recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned [R. 120], the shareholders subscribed to such fund in the amount set opposite their names [R. 121] with the intention that interest received from the bonds equalling the amount of depreciation purchased be set aside for the use of the subscribers named. An appraisal of the bond account was to be made every six months and should any decrease in the depreciation be shown, the amount of such appreciation to be divided pro rata among the stockholders purchasing the said depreciation [R. 121]. The various amounts subscribed by the

shareholders were in fact paid in, and no part thereof has ever been repaid to any of the appellants herein [R. 117]. The sum of $30,000 of the money so subscribed was used for the purpose of refunding to those stockholders and directors the amounts paid in by them in 1930 for the purpose of taking up the depreciation in the bond account shown at that time [R. 120].

The method of making a loan to the bank for the purpose of taking up bond depreciation was indicated to the directors by R. Foster Lamm, a bank examiner duly appointed by the Comptroller of the Currency [R. 102]. The said R. Foster Lamm notified the directors of the bank that the bond account of said bank was deficient. The directors then inquired of him as to what could be done about the matter and he suggested that they follow the same procedure which he caused the bank of Huntington Beach, California, to follow in 1929, namely, that the directors purchase the said depreciation in bond account which would give them a possibility of return of the money that they put in the surplus account or undivided profit account [R. 102]. The question was raised at that time as to whether or not there would be any chance of the directors getting their money back if they contributed it to the bank. R. Foster Lamm, the bank examiner, advised them that if they contributed to the bank as he suggested what they would do would be to actually buy the depreciation of the bond account [R. 103].

In the trial of this case in the District Court of the United States, the said bank examiner, under cross-examination, testified that that was one of the customary methods of repairing impaired capital for anyone interested in the bank, such as stockholders or directors or officers, and that such a method had been used in other

banks prior to the occasion when it was suggested for the repair of the capital of this bank [R. 104]. When asked whether he had ever had the approval of the Department as to such a plan, he replied that the Department had never disapproved it, nor had he received any comment from the Comptroller's office indicating disapproval [R. 105]. The first notice received by the directors and stockholders of the bank that the Comptroller's office viewed their contribution as a loan with distaste, and felt that the money already paid in should be a voluntary contribution which need not be repaid by the bank, was subsequent, to-wit, August 20, 1931, some time after they had paid in the amounts subscribed by them under what they considered to be a valid agreement to purchase the bond account repayable as hereinabove set forth [R. 118].

When R. Foster Lamm, the bank examiner for the bank, was replaced by W. J. Waldron, national bank examiner [R. 123] the said W. J. Waldron, also approved the said plan [R. 107].

The appellants Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth were stockholders but not directors of said bank and they at no time attended any of the meetings of said bank [R. 129].

On January 15, 1934, the bank was declared insolvent by the Comptroller of the Currency of the United States, and on said date the said Comptroller appointed J. V. Hogan as Receiver of the bank, and ever since said date the receiver has been, and now is, the duly appointed, qualified and acting receiver of the bank [R. 84] and as such took possession of all the assets of the bank including said bond account, and has since been liquidating the same [R. 87] without regard for appellants' rights.

After the appointment of the receiver, and on or about the 23rd day of August, 1934, L. J. Kelly, F. H. Dolan, Ben Baxter, S. J. Tuffree, Ed Kelly, F. A. Yungbluth, Minnie Palmer (formerly known as Minnie Baxter), M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw, J. J. Dwyer, Ernest F. Ganahl, Frank Baum and Josephine Baum, presented to the receiver their respective claims for the respective sums of money subscribed and paid by them to the bank, plus interest thereon, and on August 23, 1934, M. E. Day presented her claim for the sum of $875.00 paid to the bank by F. K. Day, with interest thereon, all in the manner and form required by the Comptroller of the Currency, but none of said claims, nor any part thereof has been paid [R. 88].

Many of the bonds involved in the bond account of said bank, the depreciation of which was purchased by the stockholders, were sold and an appreciation shown in their value [R. 127-128].

The rights of the appellants to recover in this case depend entirely upon the validity and enforcibility of the agreement as embodied in Plaintiffs' Exhibit 4 in the District Court [R. 120-121] and embodied in the resolution passed at the meeting of the Board of Directors as shown by Plaintiffs' Exhibit 4 [R. 121].

There appears in the record, at the demand of the appellee, exhibits and evidentiary matter which appellants deem entirely irrevelvant to the issues before this court. Appellants conceive the issue to be solely the question as to whether or not an agreement between a national bank and the directors and stockholders thereof for the loan of private moneys to the bank made upon the advice of the bank examiner for the bank is valid.

To summarize the facts, it appears that the directors and stockholders of the bank, upon the advice and at the suggestion of the bank's duly qualified and appointed examiner, loaned certain moneys of their own to the bank with the intent of purchasing a depreciation in the bond account so that the bank might benefit thereby and continue as a going concern, and by so doing paid a subscription at the rate of $175.00 per share, with the intent and purpose that such money was to be repaid to them from the appreciation in the bond account so purchased; that after such subscriptions had been paid into the bank they were notified by the Comptroller of the Currency that such an agreement should not be made; that certain of the subscribers were not directors, but were merely stockholders; that the bank later went into the hands of a receiver; that the receiver took over all the assets of the bank including said bond account; that the receiver subsequent thereto sold certain of the bonds which showed an appreciation in value; that the receiver has never repaid, nor have any of the subscribers, or any of them, at any time received, any part of the moneys subscribed by them; that no accounting has at any time been made to the subscribers by the receiver for any of the money obtained from the sale of bonds from said bond account, nor of the bonds now remaining in the assets of the bank.

Specifications by Number of the Assignments of Error Upon Which Appellants Rely.

Assignments numbers 3, 4, 6, 7 and 10 [R. 146-147-149 and 151];

Assignment number 8 [R. 150];

Assignment number 9 [R. 151];

Assignments numbers 1, 2, 11 and 12 [R. 146 and R. 152];

Assignment number 5 [R. 148].

Summary of the Argument and Points of Law.

(1) The minute record of the directors' meeting held on the 18th day of June, 1931, embodied in Plaintiffs' Exhibit I [R. 118-119] and the resolution embodied in Plaintiffs' Exhibit 4 [R. 120-121] recites the contributions made by the stockholders and directors of the bank and their intent to enter into an agreement with the bank that said contributions were made as a loan, thus creating a conclusive presumption as against the appellee that such contributions were in fact made and that such agreement was valid.

Yazoo State Bank v. Kimbrough, 127 S. 265, 157 Pac. 149.

(2) The letter from the Comptroller of the Currency addressed to the directors of the bank subsequent to the time when said contributions were made at the instance and suggestion of the national bank examiner, R. Foster Lamm [R. 112-113] is not binding upon the appellants because it was written, and received, subsequent to the transaction in question, and in the case of the contributing stockholders who were not directors, was not seen by them, nor were they apprized of its contents, and did not

by its terms forbid such an agreement but merely stated that such action *should* not be taken [R. 113].

The same is true as to the cross-examination by counsel for the bank as to matters and events which had transpired a year prior to the transaction involved in this particular case [R. 108-109].

(3) The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders or creditors, and in the instant case the receiver's failure to account to the contributing appellants for the appreciation in the sale of the bonds purchased by them and the disposition of the remaining bonds was and is unlawful.

Way v. Camden Savings Deposit and Trust Co., 21 Fed. Supp. 700;

Brown v. Schleier, 112 Fed. 577, aff'd 118 Fed. 981, 55 C. C. A. 475, which is aff'd 24 Sup. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

(4) By reason of the appointment of the receiver and the liquidation of the bond account purchased by the directors and stockholders prior to said appointment, there was a failure of consideration for the amounts of money contributed respectively by the appellants to said bank.

Code 1930, Secs. 22-1802;

Skinner etc. v. Rich et al., 55 Pac. (2d) 1146.

(5) The respective claims of the appellants presented to the receiver were valid and subsisting claims against the bank.

Eisele v. First National Bank, 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal 1928), 142 Atl. 29, 102 N. J. Equity 598.

ARGUMENT.

Preliminary Observations.

The pleadings, shorn of all by-play and irrelevant verbiage in the answer of the appellee, admits all of the allegations of the complaint and raises but one issue [R. 50-74]. Appellants base their respective claims against the bank upon the agreement with the bank as embodied in Plaintiffs' Exhibits I and IV [R. 118-119 and R. 120-121]. The appellee by its answer admits the payment of the respective amounts by the respective appellants, and the fact that those amounts were never repaid in any manner or at all to the appellants, or any of them, but denies the validity of the agreement of the bank with the appellants [R. 50-74]. The appellee bases its whole case on the letter written by the Comptroller of the Currency to the Board of Directors of the bank subsequent to the transaction which constitutes the cause of action herein [R. 113], and other letters to like effect that contributions as made in this case to restore capital *should* be made unconditionally and without the expectation of reimbursement, and a letter from the Comptroller of the Currency under date of July 2, 1930, in regard to an entirely different transaction which had no bearing upon the issues in this case [R. 109]. No attack is made on the agreement of June 18, 1931 [R. 121] except the validity thereof, based upon the letters of the Comptroller of the Currency already referred to. The evidence, without contradiction or conflict, shows the contributions of the moneys by the appellants [R. 121], the intent to make such contribution as a loan to the bank [R. 121] to be repaid in pro rata shares should a decrease in the depreciation be shown [R. 121]. The evidence further shows without contradiction that Minnie Palmer, formerly known as Minnie Baxter,

M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, appellants, were stockholders and not directors of the bank and that they at no time attended any of the meetings of the bank [R. 129].

In connection with the letter from the Comptroller of the Currency of August 20, 1931 [R. 112-113], it is to be noted that no place in that letter does the Comptroller state definitely that such contributions *cannot* be made as loans to the bank, but instead he uses this language. We quote:

> "* * * this office wishes to bring to your attention again at this time the fact the contributions made to restore capital *should* be made unconditionally and without the expectation of reimbursement. * * *" (Italics ours.)

It is further to be noted that although the Comptroller of the Currency had advised the president of the bank to like effect on July 2, 1930, in regard to an entirely different transaction, in regard to the resolution passed at a meeting of the Board of Directors on the 29th day of May, 1930 [R. 110], he at no time voiced disapproval of the refund to the contributing stockholders in that transaction of the sum of $30,000. It was not until the bank was declared insolvent and the receiver appointed in 1934, three years later, that the directors and stockholders received their first definite notice that the Comptroller of the Currency would not recognize their agreement with the bank as valid. Certain it is that no fact or circumstance as presented in this action even remotely raises an issue with respect to the existence of the agreement. The only issue taken is as to the validity and enforcement of the agreement.

I.

The Directors of a Bank Can Make a Valid Contract With It in Absence of Fraud, Bad Faith or Undue Advantage.

The assignments of error relied upon are:

"3. That the Court erred in Finding No. IV that the plaintiffs F. K. Day and all of said plaintiffs except M. E. Day and Josephine Baum, together with other shareholders of said bank, or any of them, did not enter into an agreement with said bank whereby the said other shareholders of said bank, and said F. K. Day and all of the plaintiffs, except M. E. Day and Josephine Baum, or any of them, agreed to purchase from said bank said depreciation then existing in said bond account; and that it was not true that by the terms of any such agreement said bank agreed to pay from time to time to the aforesaid parties, or to any of them, any pro rata decrease which might from time to time appear in said depreciation of said bond account; that said Finding No. IV is contrary to the evidence both oral and documentary, and is not in accordance with the law." [R. 146-147].

"4. That the Court erred in Finding No. V that it is not true that in any such agreement, as set forth in said complaint, or otherwise, the following persons respectively agreed to pay to said bank the following, or any other sums:

L. J. Kelly	$ 4,900.00
F. H. Dolan	32,500.00
Ben Baxter	1,750.00
S. James Tuffree	3,500.00
Ed. Kelly	9,000.00
F. A. Yungbluth	1,700.00

Minnie Palmer (formerly known as Minnie Baxter)	3,850.00
M. Del Giorgio	875.00
Jennie Pomeroy	3,500.00
J. W. Truxaw	1,750.00
J. J. Dwyer	1,750.00
F. K. Day	875.00
Ernest F. Ganahl	1,750.00 and
Frank Baum	5,250.00;

and it is not true that pursuant to such agreement said persons, excepting Ernest F. Ganahl and Frank Baum, on or about July 17, 1931, paid to said bank the sums hereinabove set opposite their respective names and it is not true that pursuant to any such agreement said Ernest F. Ganahl on or about July 17, 1931 executed his promissory note for $1,750.00 to said bank or that, pursuant to such agreement he made any payments of principal or interest on such a note; and it is not true that pursuant to any such agreement said Frank Baum executed his promissory note dated December 19, 1932, for $5,250.00 to said bank or that pursuant to such agreement he paid interest on said note, or that, pursuant to such agreement, plaintiffs, Frank Baum and Josephine Baum on or about May 9, 1933 executed and delivered to said bank a certain trust deed on the property described in the fourteenth count of the complaint on file herein; that the Court erred in Finding No. V that it is true that said payments were made and said notes and trust deed were executed and delivered by said persons as voluntary contributions to said bank and said bank was not and is not obligated under any such agreement or otherwise to repay said sums or any part thereof, and said bank has not repaid the

same or any part thereof; that said finding is contrary to the evidence both oral and documentary and is not in accordance with the law." [R. 147.]

"6. That the Court erred in Finding No. X that it is true that none of said claims was a valid or proper claim against said bank or in the matter of the receivership of said bank; that said finding is not in accordance with the law, nor with the evidence or facts of the case." [R. 149.]

"7. That the Court erred in Finding No. XI that it is not true that within two years prior to the preparation of the complaint, on file herein, or within two years prior to the filing thereof, the persons hereinabove in Finding No. V named, loaned respectively to said bank the sums respectively set after their names in said Finding No. V; and it is not true that said bank received said respective sums, or any of said sums or any part thereof, for the use and benefit, or use or benefit, respectively of said persons, or any of said persons, whose names are set forth in Finding No. V; and it is not true that said bank promised to repay said sums on demand or otherwise; and the Court further erred in Finding No. XI that it is also true that said bank is in no way obligated, in the matter of said receivership or otherwise, to repay said sums or any part thereof to said persons or to any persons or person whomsoever; that said finding is not in accordance with the evidence both oral and documentary and is not in accordance with the law." [R. 149-150.]

"10. That the Court erred in paragraph I of his Conclusions of Law in finding that there did not exist any contract between said bank and the persons who made the payments to said bank hereinabove set

forth whereunder and whereby said bank was obligated to repay said sums or any part thereof; that said payments were voluntary and unconditional contributions to said bank, and were such because of the requirement of the law in that respect and because of the acquiescence by said persons for a long period of time in the notification and instruction given by the Comptroller of the Currency that such contributions must when made be considered as voluntary and unconditional contributions without obligation on the part of the bank to repay same; that said finding is not in accordance with the law or the facts of the case and is against the evidence both oral and documentary." [R. 151-152.]

The contributions to the bank on the part of the appellants were not voluntary contributions. They were made to take up a deficiency in the bond account at the instance and request of the bank examiner, R. Foster Lamm, who was a duly appointed and qualified representative of the Comptroller of the Currency. [R. 102-103.] Indeed, they were made after the said R. Foster Lamm, had informed the directors of the bank, who had questioned the said R. Foster Lamm as to that method, had told them that that same procedure had been followed by the First National Bank of Huntington Beach, California in 1929. [R. 102.] The contributions were made solely for the benefit of the bank and in order that the bank could remain open and not be declared insolvent. Had it not been for such contributions the bank's capital would have remained impaired and under the National Banking Act the Comptroller of the Currency would have had to cause it to close its doors.

The consideration for the contributions made was the depreciation in the bond account.

There was no fraud, no bad faith, or undue advantage practiced by the directors in causing such contributions to be made to the bank. There could be no wrong on the part of the directors and stockholders in purchasing the depreciation in said bond account.

In the case of *Everett v. Staton,* 134 S. E. 492, 192 N. C. 216, the Court used the following language:

> "Directors of bank can make valid contract with it, in absence of fraud, bad faith or undue advantage."

In the case of *Andrew v. Citizens State Bank of Goldfield,* 221 N. W. 954, 207 Iowa 386, the Court found as follows:

> "Officers of insolvent bank, who made loan to bank, may be termed depositors to extent which loan consisted of deposits."

Again, in the case of *Eisele v. First National Bank,* 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal, 1928), 142 Atl. 29; 102 N. J. Equity 598, it was held as follows:

> "Directors advancing money to bank to meet deficit caused by depositor's overdraft, may recover such money on settlement."

It has been held in the State of California that such agreements were valid agreements and that contributions so made are not voluntary contributions. It was so found in the case of

> *Dudley v. Citizens State Bank of Santa Monica,* 103 Cal. App. 433.

To the same effect is an early district of Ohio case, *Booth v. Welles,* 42 Fed. (2d) 11. In this case the particular portion which we refer to is on page 14.

Along this same line we cite the case of *In re Hulitt,* 96 Fed. 785, wherein we find the following:

> "Where the number of shareholders of a national bank in good faith paid an assessment made to comply with the requirements of the Comptroller to make good an impairment of the bank's capital, although such an assessment was invalid, because made by the directors instead of by the stockholders, on the insolvency of the bank, and after the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amount so paid, before general distribution of remaining assets among all the shareholders."

In the case of *Wyman v. Bowman,* 127 Fed. 257, the Court said:

> "Contracts between directors of a corporation and the corporation, which are fair and made in good faith which do not secure an unjust benefit, and in which the interest of the individuals and the duty of the officers *work together for the welfare of the corporation are valid."* (Italics ours.)

To the same effect are the following cases:

Rhea v. Newton, 262 Fed. 345, certiorari denied (1920);

Newton v. Rhea, 41 S. C. 14, 254 U. S. 643; 65 L. ed. 454;

McLean v. Bradley, 299 Fed. 379. Affirming judgment (D. C. 1932), 282 Fed. 1011. Certiorari denied S. C. 98, 266 U. S. 619, 69 L. ed. 471;

In re Lake Chelan Land Company, 257 Fed. 497, 5 A. L. R. 577.

In the case of *Yazoo State Bank v. Kimbrough,* 127 S. 149, the Court said:

> "Cashiers and directors putting up cash in place of notes, examiner rejected, held entitled to proceeds of notes when collected."

The language just quoted is an exact statement of what appellants contend the law to be. In the instant case we have a bond depreciation which was purchased by the directors and other stockholders for the benefit of the bank, under an agreement that an appraisal be made of such bond account every six months and that any appreciation shown in said bond account would be distributed among the contributing directors and shareholders in pro rata shares. In other words the directors and shareholders purchased the depreciation in the bond account which the bank examiner rejected and any appreciation in that bond account should have been distributed to the appellants who purchased the same.

II.

Letter From the Comptroller of the Currency Addressed to the Directors of the Bank Subsequent to the Time When Said Contributions Were Made at the Instance and Suggestion of the Bank Examiner, R. Foster Lamm, Is Not Binding Upon the Appellants Because It Was Written and Received Subsequent to the Transaction in Question, and in the Case of the Contributing Stockholders Who Were Not Directors, Was Not Seen by Them nor Were They Apprized of Its Contents. The Same Is True of Any Letters Addressed to the President of the Bank Prior to the Date of This Transaction Referring to a Totally Different Transaction.

The assignment of error relied upon is:

"8. That the Court erred in Finding No. XII that it is also true on various occasions and at various times between July, 1930 and November, 1931 said Comptroller of the Currency, through his duly authorized deputy comptrollers, notified and instructed said bank, and the officers and directors thereof, that payments made to repair the impaired capital of said bank must be considered as voluntary and unconditional contributions, without obligation of repayment, that each and all of said persons who made said payments hereinabove referred to acquiesced by lapse of time and otherwise in said notification and instruction of said Comptroller of the Currency; that said payments were payments made to repair the impaired capital of said bank and were, each and all, voluntary and unconditional contributions, without any obligation whatsoever on the part of said bank to repay same; that the law requires all payments such as those made by plaintiffs under the circumstances

shown by the evidence herein to be voluntary and unconditional and without any obligation whatsoever on the part of the bank to repay same, as to the plaintiffs, Minnie Palmer, formerly known as Minnie Baxter, Jennie Pomeroy, M. Del Giorgio and F. A. Yungbluth, and as to those plaintiffs is contrary to the undisputed evidence; that to each and all of the plaintiffs, except Frank Baum and Josephine Baum, husband and wife, said Frank Baum and Josephine Baum having withdrawn as parties plaintiff and said action having, by Order made and entered herein June 5, 1937, been dismissed so far as the same affects and relates to them, said finding has no application in law by reason of the fact that the said correspondence therein referred to all took place *after* the said contract had been consummated, and said finding is not in accordance with the law." [R. 150-151.]

The contributions were subscribed on June 18, 1931 [R. 118-119-120-121] and in a letter dated August 20th, two months afterwards, the Comptroller of the Currency notified the Board of Directors of the bank, in part, as follows:

> "A Capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in this report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash, and $41,875 in the form of fourteen ninety-day notes. There were still eighteen stockholders to interview and obtain contributions from."

Then the fourth paragraph of the same letter:

> "Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without the expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard." [R. 112-113.]

No place in that letter did the Comptroller of the Currency say that such contributions *must* be considered as voluntary but merely that they *should* be. As readily noticed, this letter was written subsequent to the date of the transaction in question, and therefore could not be binding upon the parties.

The only time prior to the transaction with which we are dealing here, when the Comptroller of the Currency made any comment as to the handling of such situations was prior to the time when his bank examiner, R. Foster Lamm, advised the procedure adopted in this case, to-wit, in an entirely different transaction, which took place on the 29th day of May, 1930, one year prior to this transaction. The same law therefore applies. It is also to be noticed that at no time has the repayment of that loan been at issue.

III.

The Evidence Presented in the Trial of the Case Showed That There Had Been an Appreciation in the Value of the Bonds Taken Over by the Receiver of the Bank.

The Assignment of Error relied upon is:

> "9. That the Court erred in Finding No. XIII that it is true that no evidence has been presented to this Court proving any appreciation in the value of the bonds in said bond account, the depreciation in which bond account is alleged by plaintiffs to have been purchased by plaintiffs or, in the case of plaintiffs, M. E. Day, her predecessor in interest of F. K. Day; and that no evidence has been presented to this Court of any legal damage or loss suffered or sustained by plaintiffs, or any of them, which is not in accordance with the law or the facts of the case, and is contrary to the evidence, both oral and documentary." [R. 151.]

The written instrument "Disposition of Bonds" [R. 127-128] shows on its face an appreciation in the bond account of $655.62, obtained by the Receiver for the bonds which were sold. These bonds were among those listed in the depreciation which the appellants purchased. Since the best evidence is the written instrument, we can see no reason to argue this point.

IV.

The Equities in This Proceeding Are With the Appellants.

Without repeating what we have said in the foregoing argument, we respectfully submit to the Court that the facts and circumstances show that it was the desire and intent and purpose of the appellants to aid the bank which was in distress due to an impairment of capital caused by depreciation in the bond account, *but* that the appellants contributed to the fund for the purchase of said depreciation only as a loan to the bank, such moneys to be repayable to them by the bank, if and when the said bond account appreciated in value. This they did under what they considered to be a valid agreement with the bank, signed by the proper officers on behalf of the bank. They had the word of the bank examiner, who had been appointed by the Comptroller of the Currency, that this could and had been done on a prior occasion. They were further justified in their belief by reason of the fact that part of the money which they were contributing in this transaction was to be used for the repayment of a prior contribution made in identically the same circumstances [R. 120], which was later done and never disapproved by the Comptroller.

It was not until subsequent to the time when they had already put up their money that the directors were notified by the Comptroller that this method should not be used. Even then they were not definitely advised that such a method must not be used. [R. 113.] Further, they were at no time advised by the Comptroller's office that the repayment of the amounts refunded to the stockholders and directors, who contributed on the prior occasion, was unlawful.

In the case of the appellants, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, were stockholders and not directors of the said bank, and who at no time attended any of the meetings of said bank. [R. 129.] They were never advised nor in any way apprised of the fact that the Comptroller's office at any time, or at all, whether prior or subsequent to the transaction in question, objected to the contributions being made in the form of a loan.

The agreement between the bank and the appellants was recognized as a valid agreement from the 18th day of June, 1931, until the bank was declared insolvent and the receiver appointed, three years later. The latter took over the bonds in said bond account and refused to acknowledge the respective claims of the appellants herein, which were duly presented to him all in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24], more than three years after the contributions were made.

It is the position of the appellee that, because some of the appellants were notified subsequent to the transaction, that the transaction *should* not have been made, that no equities arise in behalf of the appellants. Every principal of equity decries such a position.

Arguing this case as a case in equity, rather than a case at law, an agreement was entered into between the bank and its directors and certain stockholders thereof. The appellee contends that this agreement was unlawful. If it was unlawful then it was void from its inception.

Civil Code of California, Sections 1667, 709-16;

6 *R. C. L.* 692-694-696;

58 *A. L. R.* 804.

But this was not a contract *malum in se,* but was merely *malum prohibitum,* entered into through mistake in law and fact.

McKinney's Digest, Contracts, Section 32;
4 *Cal. Jur.* 784;
6 *Cal. Jur.* 78;
6 *R. C. L.* 620;
6 *R. C. L.* 629.

Under no theory could it become a contract as viewed by the appellee since, if the appellee is correct in its view at this time, then there was no mutuality of consent.

McKinney's Digest, Contracts, Section 14;
6 *Cal. Jur.* 44;
6 *R. C. L.* 686;
26 *A. L. R.* 473 (Notes).

As soon as their mistake was discovered by the appellants they brought action. They did not sleep on their rights. The position of the appellee is untenable. Equity has never permitted advantage to be taken of a mistake whether in law or in fact, nor has equity ever permitted unjust enrichment of one party to a contract at the expense of the other.

We have presented what we conceive to be the only issues involved in this action. Nothing in the record discloses any other issue. The fact that the Comptroller of the Currency notified the president of the bank (who is not an appellant) that a prior transaction was not in accordance with his views has naught to do with the transaction in controversy, nor does such a fact open the door to surmise and conjecture. Nor does anything which has transpired since the date of the transaction change the rights of the respective appellants.

V.

The Findings of Fact, Conclusions of Law and Judgment Filed Herein Are Not Supported by the Evidence.

The Assignments of Error relied upon are:

"1. That the Minute Order of the Court determining and ordering that Findings and Judgment be entered in favor of the defendants was not in accordance with the law and the facts of the case." [R. 146.]

"2. That the Minute Order of the Court denying the plaintiffs' Motion for New Trial was not in accordance with the law." [R. 146.]

"11. That the Court erred in paragraph II of Conclusions of Law in finding that none of the plaintiffs herein is entitled to recover any sum so paid to said bank or any promissory note given to said bank to cover his contribution, as hereinabove set forth, either under causes of action numbers I to XIV, inclusive, or under causes of action numbers XV to XXVIII, inclusive, of plaintiffs' complaint on file herein; that said Finding is contrary to the evidence and not in accordance with the law." [R. 152.]

"12. That the Court erred in paragraph III of his Conclusions of Law in finding that defendant Anaheim First National Bank, a national banking association, is entitled to judgment herein, together with its costs of suit; that said Finding is not in accordance with the law." [R. 152.]

There seems to be some confusion in the mind of the learned trial judge as to the contributing appellants who were directors of the bank and who attended the meet-

ings of the bank and as to the contributing appellants who were stockholders but not directors and who did not attend any of the meetings of the board of directors of the bank. There was insufficiency of evidence to justify the decision that appellee is entitled to judgment in this case.

We believe that we have demonstrated that the agreement entered into between the appellants and the bank was a valid agreement and that the appellants did in fact purchase the depreciation in the bond account; that the receiver stood merely in the shoes of the bank and succeeded to no greater rights than had the bank. Hence the appellants were entitled to an accounting from the receiver as to the proceeds of the bond account and are entitled to the proceeds now in the hands of the receiver from the disposition of said bond account.

Should this Honorable Court find this case one in equity rather than a case at law, then the appellants are entitled to a refund of the respective amounts contributed by them under the agreement, which the appellee now contends was unlawful.

We respectfully ask that the decree of the District Court be reversed.

Respectfully submitted,

EDW. C. PURPUS,

Attorney for Appellants.

No. 9020

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED.

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ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S BRIEF.

Old Procedural Rules Govern This Appeal.

It should be remembered that, because of an order made by the trial judge upon application of plaintiffs and appellants herein [Tr. p. 162], pursuant to Rule 86 of the new Federal Rules of Civil Procedure, this appeal is governed by the procedural rules in force prior to September 16, 1938, the new rules not being considered feasible to work justice in this action.

Error in Title of Cause on Appeal.

The title of this cause on appeal, as it appears on the cover and introductory page of the Transcript of Record, should be corrected by striking out Ernest F. Ganahl as an appellant—the appeal having as to him been dismissed before the record was prepared [Tr. pp. 159 and 160]—and by striking out the reference to J. V. Hogan, receiver, intervenor, as an appellee—said Hogan never having appeared as a party defendant either as receiver or intervenor, and there being but one defendant and appellee, to-wit, Anaheim First National Bank, a national banking association.

Regarding Appellants' Jurisdictional Statement.

Most of what appears in appellants' Jurisdictional Statement (App. Br. p. 2) is satisfactory, with these two exceptions:

In the first place, this action was filed as an action at law and not in equity [Tr. p. 2], was tried by plaintiffs, who are appellants herein, on the theory that it was an action at law, with written waiver of jury trial [Tr. p. 78], and was appealed as an action at law [Tr. p. 144], with a bill of exceptions prepared under the rules applicable to appeals on the law side [Tr. p. 94]. This is important in connection with appellants' attempt to argue this case "as a case in equity rather than at law" and their request for equity relief "should this Honorable Court find

this case one in equity rather than a case at law" (App. Br. pp. 26-30).

In the second place, appellants, in commenting on the pleadings, make the statement (App. Br. p. 4) that "the only issue taken is a denial that the plaintiffs and appellants entered into a lawful agreement with the bank whereby they, and each of them, agreed to purchase from said bank the depreciation then existing in the bond account." This is not the fact. This is only one phase of the matter, as a perusal of the pleadings will clearly show [Tr. pp. 4-34, 50-73]. The effect of the pleadings was to put in issue the following with reference to the more important points involved: Whether an agreement of the sort alleged by plaintiffs had in fact been entered into, irrespective of its lawfulness or unlawfulness, whether such an agreement could under the circumstances have been lawfully entered into, whether the consideration for such agreement (if actually entered into) wholly failed by reason of the appointment of a receiver for the bank and the liquidation of its assets, whether plaintiffs respectively loaned to the bank the sums alleged to have been loaned by them, the bank receiving same for the use and benefit of the respective plaintiffs and promising to repay same on demand, whether the claims filed by the respective plaintiffs with the receiver are valid or subsisting claims against the bank, and whether the bank is in fact indebted to the respective plaintiffs for the respective sums referred to in the complaint.

STATEMENT OF THE CASE.

In discussing appellants' Statement (Br. pp. 5-10) we must, at the outset, invite attention to the fact that it is based on only a part of the facts as adduced at the trial.

There is no pretense that the evidence brought up on this appeal and appearing in the Transcript of Record is all the evidence adduced at the trial. There are merely certain excerpts of testimony representing the testimony "in part" of certain witnesses [Tr. pp. 102, 107, 111, 117, 123, 124 and 125]; only four of the exhibits (Plffs' 1, 2 and 3, and Deft's H) are before the appellate court [Tr. pp. 118, 119, 121 and 127]; and the judge in settling the Bill of Exceptions merely certifies to the rulings and exceptions specified therein and does not certify to said Bill of Exceptions as containing all the evidence or all the material evidence produced at the trial [Tr. p. 142].

It would therefore be impossible to give an adequate and complete statement of the case and of the effect of the evidence adduced in the trial court without going *dehors* the record. Accordingly we must take issue with appellants if they mean to imply that their Statement (Apps. Br. pp. 5-10) is in substance or effect a synopsis of all the material facts and the proper conclusions to be drawn therefrom. Appellants base their Statement in large part on selected bits of evidence which, if taken alone and unconnected with other evidence, might conceivably lend some color to their contentions. But the judge of the trial court had before him, in deciding the case, all the evidence, favorable and unfavorable to the plaintiffs who are now the appellants. In making his decision he resolved whatever conflict existed in favor of defendant bank which is now the appellee. Sitting without a jury he had to, and

did, weigh the evidence—and we have his findings and conclusions. Unless the appellate court has before it all the material evidence it cannot entertain, much less accept, appellants' statement of facts.

In addition to the general objection above indicated we must—lest the court be misguided—urge a number of specific objections to particular statements made by appellants. They put the onus of the plan for the so-called purchase of the depreciation in the bond account on bank examiner Lamm and thereby seek to bind the Comptroller of the Currency. Even from the incomplete record on appeal we can gather a certain amount of information as to this plan from the partial testimony of Mr. Lamm himself, one of plaintiffs' witnesses [Tr. p. 103]. He says that after completion of his examination a board meeting was held and "ways and means to restore the capital impairment" were discussed and he then says:

> "We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation of the bond account. That would give them a possibility of return of the money that they put in the surplus account or undivided profit account."

Apparently it was his idea and the only time it had been used before was when he used it in connection with a bank at Huntington Beach. It was not—as Lamm's subsequent answers show and despite appellants' assertion to the contrary—one of the customary methods of repairing impaired capital. The Comptroller's office never advised him whether or not it was a proper method of repairing impaired capital. He never got the approval of the Comptroller's office for it [Tr. p. 104, 105]. Obviously any

uch plan was an attempt to avoid, if possible, having to ake an outright contribution to repair the bank's im-aired capital, unconditional and without expectation of eimbursement. If such a plan was put into execution uring and after June, 1931, it was put into execution in ne face of warnings on various occasions from the Comp-roller of the Currency between July, 1930 and November, 931 that payments made to repair the impaired capital ust be considered as voluntary and unconditional con-ributions, without obligation of repayment [Finding XI, r. p. 89]. While appellants do not bring up on this ap-eal all the material evidence in this regard they do refer o an exchange of letters in 1930 between the bank and ne Comptroller's office [Tr. p. 109 and App. Br. p. 14] nd they do quote a part of a letter dated August 20, 1931 rom said Comptroller's office [Tr. p. 112 and 113]. These ill give the appellate court some suggestion of the evi-ence before the trial court. We insist that it is not true, s appellants claim it to be [Tr. p. 8], that the first notice eceived by the directors and stockholders that the Comp-roller's office viewed their contribution as a loan with istaste and felt that the money "should be a voluntary ontribution which need not be repaid by the bank," was ubsequent to June, 1931, to-wit, in August, 1931. The ourt specifically found that as early as July, 1930 the omptroller notified and instructed the bank that con-ributions to repair impaired capital must be voluntary nd unconditional, without obligation of reimbursement; nd of course appellants' incomplete record does not bring p to this court all the evidence in support of this finding. here was more than a "distaste" and "feeling" on the omptroller's part. There was notification and instruction.

Appellants say that Waldron, Lamm's successor as bank examiner, approved the plan (App. Br. p. 8). This is a conclusion unjustified even by the incomplete testimony in the record on this point [see Tr. pp. 107, 123 and 124], and seems to be based merely on a statement by Dolan, the president of the bank, that "Waldron seemed to think that this was O. K." [Tr. p. 107.]

Appellants say that "many of the bonds" involved in the bond account were sold and an appreciation shown in their value (Br. p. 9). If by this they mean to imply that an appreciation was shown in many, they are mistaken in the light of even the incomplete evidence brought up from the lower court. Defendant's Exhibit H [Tr. pp. 127 and 128] shows on the sale of two sets of bonds after June, 1931 an appreciation totalling a mere $655.62, and on the sale of the remaining sets of bonds after June, 1931 a further large and bad depreciation totalling $137,058.67; with the result that on the bond account as a whole there was a further net depreciation of $136,403.05 below the book value of the account as of the time of the alleged purchase of the depreciation in June, 1931. Restricting ourselves to this one exhibit, without having before us the complete testimony in explanation of it, we nevertheless can see that if it shows anything it shows merely a further bad slump in the bond account, plummeting the bank into a worse condition than before and leaving nothing for appellants even on their own theory as to their rights to share in any appreciation in the bond account.

Finally, we disagree very definitely with appellants' contention (Br. p. 9) that there appears in the record—by which we assume they mean the record in the trial and not in the appellate court—exhibits and evidentiary matter "entirely irrelevant to the issues before this court." If such relevancy is to be tested it cannot be tested by the *ipse dixit* of appellants but only by placing such exhibits and evidentiary matter before this court for examination by it.

The issue is not, as appellants contend it is (Br. p. 9), "solely the question as to whether or not an agreement between a national bank and the directors and stockholders thereof for a loan of private moneys to the bank made upon the advice of the bank examiner for the bank is valid." There is much more to the issue than that. Here we have a defunct bank which ever since January, 1934 has been in the hands of a receiver [Tr. p. 5], for liquidation primarily for the benefit of creditors. Certain officers and stockholders of the bank assert that on or about June 18, 1931 they entered into an agreement with the bank whereby they purchased a rather nebulous thing which they refer to as the depreciation then existing in the bond account, the bank agreeing to pay to them from time to time any prorata decrease which might appear "in said depreciation of said bond account" [Tr. pp. 5 and 6]. They assert that by reason of the fact that a receiver has been appointed and the bank's assets are being liquidated the consideration for the payments made to the bank in buying such depreciation "wholly failed," and therefore that the bank is indebted to them in the amounts of their re-

spective payments [Tr. pp. 6 and 7], which amounts are now represented by claims filed with such receiver [Tr. p. 7]. They also set forth their respective causes of action in the alternative form of counts for money loaned to the bank for the use and benefit of such officers and stockholders, the bank having promised to repay same on demand.

Admittedly the purpose of the whole business of raising money was to repair the impaired capital of the bank. The real issue before the trial court was not as simple as appellants pretend. In fact it was multiple and was substantially this: whether or not appellants actually entered into the sort of agreement contended for by them; whether or not such an agreement could legally be made in the face of the prior, concurrent and subsequent warnings of the Comptroller of the Currency to the bank that payments made to repair impaired capital must be considered as voluntary and unconditional contributions, without obligation of repayment by the bank; whether or not, assuming such an agreement to have been made, appellants were estopped to assert same in the face of other creditors —depositors and third parties—who relied, and had a right to rely, on an unimpaired capital: whether or not there had been, as claimed by appellants, a failure of consideration; and whether or not, assuming the existence and validity of such an agreement, there actually was an appreciation in the bank account subsequent to June, 1931, to which they were entitled. There incidentally arises the question as to whether or not, if the so-called purchase of the depreciation in the bond account was made at the suggestion of the bank examiner, the appellants have rights which otherwise they would not have had.

Reply to Appellants' Summary of Their Argument and Points of Law.

Appellants' summary of their argument and points of law appears on pages 11 and 12 of their brief. Under point 1 appellants contend that as the minutes of the June 18, 1931 directors' meeting (Exhibit 1) and the directors' resolution (Exhibit 4) recite the contributions by the stockholders and directors and their intent to enter into an agreement with the bank that such contributions were made as a loan, there is thus created a "conclusive presumption" as against appellee that such contributions were in fact made and that such agreement was valid; and in support thereof is cited the case of *Yazoo State Bank v. Kimbrough,* 127 So. 265. We are unable to fathom how this startling result follows and certainly the cited case (more fully discussed hereafter) is no authority for the point attempted to be made.

With reference to appellants' point 2, this need only be said: notice from the Comptroller was prior, not subsequent. The court has specifically found that at various times between July, 1930 and November, 1931 the Comptroller of the Currency notified and instructed the bank, and its officers and directors, that payments to repair the impaired capital of said bank *must* be considered as voluntary and unconditional contributions, without obligation of repayment [Tr. p. 89, Finding XI]. Appellants assert they entered into their contribution arrangement on or about June 18, 1931. July, 1930 was obviously prior to June, 1931. Nor can appellants in this appeal select from the exhibits one letter only and attempt to predicate upon in their attenuated argument tht the Comptroller merely intended that they *should* not—not that they *must* not—enter

into the arrangement heretofore described. The fact that said letter was not seen by those contributing stockholders who were not also directors can have no effect, because the stockholders are bound by what their agents, the directors, do in the management of the bank.

With reference to appellants' point 3, this need only be said: First, the broad statement that the receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders or creditors, may, unless explained or qualified, be highly misleading. It must be borne in mind that once a bank has failed and gone into receivership, it frequently happens that its general creditors may have a distinct legal advantage over its officers, directors and stockholders, even though as between the officers, directors and stockholders themselves one group may, after the bank's general creditors have been satisfied, have a legal advantage over another group, for example, contributing over non-contributing stockholders. This is recognized by such cases as *Utley v. Clarke,* 16 Fed. Supp. 435, *In re Hulitt,* 96 Fed. 785, and *Heath v. Turner,* 77 S. W. (2d) 9. Second, there was under the circumstances no obligation on the receiver to account, but assuming for argument, that he should account, the only evidence in the record possibly bearing on the matter is Exhibit H [Tr. pp. 127-128], which clearly shows that there was not only no appreciation in the bond account but that there was actually a further depreciation of approximately $136,400.00 after June, 1931. There is no evidence that any bonds other than those listed in Exhibit H are involved in this action. We are unable to see the applicability of *Way v. Camden Safe Deposit & Trust Co.,* 21 Fed. Supp. 700, and *Brown v. Schleier,* 112 Fed. 577.

With reference to appellants' point 4, the evidence learly shows the contrary, namely, that there was no ailure of consideration by reason of the appointment of a eceiver and the liquidation of the bond account. The epreciation in the bond account was, if we are to take laintiffs' view of it, bought in June, 1931. No receiver as appointed until January, 1934. Thereafter bonds were old at various times between February, 1934 and October, 936 (Exhibit H). Although the evidence brought up in ie appeal record is incomplete, it is nevertheless clear that ie depreciation was bought or the contributions made, hichever be the fact, as an expedient to repair the npaired capital of the bank as it existed in June, 1931. hat was the impelling motive and consideration: to keep ie bank open. The bank did continue open for two and half years. That was ample consideration; besides hich, assuming appellants' own contention as to the rrangement itself, there was a chance of the stockholders aking money or at least recovering their money if things ent well and the bond account appreciated sufficiently with me. *Skinner v. Rich,* 55 Pac. (2d) 1146, is hardly an uthority for appellants' contention: quite the contrary hen analyzed. Here the stockholders, to avoid an assess-ient, made an odd sort of contract with their bank in eptember, 1931 to guarantee the reduction of certain ssets from the then book value of $7682.00 to $4432.00, ich reduction to be made in the amount of $1250.00 on or efore December 31, 1931, and the balance of $2,000.00 n or before December 31, 1932, provided certain condi-ions were met by the bank itself. All this was done to ieet the objections of the State Superintendent of Banks ith respect to certain assets valued—unjustifiably, as he ought—at $7682.00. The stockholders made good the

first amount of $1250.00, but in April 1932—before it came time to make good the balance—the bank went into receivership. The court held that the stockholders could not be sued for this balance because the bank itself could no longer meet the condition precedent required of it, towit, that it restore its impaired capital by December 31, 1932. The court points out that the parties who contracted had in contemplation the continued operation of the bank until, at least, the date of the final payment.

> "The bond (contract) provided in effect that if the bank were unable to make up the deficiency, through earnings or otherwise, the defendants would pay the sum necessary to restore the impaired capital. To recover on such a bond it was essential to allege and prove the failure of the bank to restore its impaired capital." (P. 1149.)

Incidentally there is a strong dissenting opinion, supporting the proposition of an immediate liability upon the contracting stockholders. In any event the facts of that case differentiate it clearly from our case. We invite attention to the following apt statement by the court at page 1148:

> "We see no merit to the contention of the defendant Rich (a stockholder) that the alleged contract is without consideration. The defendant stockholders were threatened with an assessment in order to operate the bank. The forbearance to demand such assessment constituted the consideration. The defendants (stockholders) were undoubtedly benefited by such forbearance" (citations).

In our case the June, 1931 contributions, or whatever they may be called, avoided the closing of the bank which doubtless would have ensued had the impaired capital not been

epaired; and, as we have said, the bank continued open or two and a half years.

As to appellants' point 5, it is sufficient to say that the laim involved in *Eisele v. First National Bank,* 137 Atl. 27, was wholly different from the claim involved in our ase. In the *Eisele* case the bank directors, in order to over a loss resulting from a depositor's heavy overdraft, aid into the bank money sufficient to meet the draft-eficit which was subsequently paid in full by said de-ositor. As the court says, at page 828:

> . . . "The situation presented is the simple one where one party in whose favor an obligation may exist has been indemnified or paid by one who, under some form of pressure, felt he was obliged to so respond, and later on the principal obligor or debtor himself pays the obligation in full. Under such circumstances it would be inequitable for the grantee or obligee to retain the money of both obligors; and manifestly the one who was only secondarily liable should be entitled to have the money paid by him returned. Otherwise the obligee would be unjustly enriched to the extent of having received payment of its obligation twice."

The case is distinguishable from ours on several grounds. 'or one thing, it is not a case of repairing impaired capi-al. For another, it concerns a double payment of a debt. n our case, there could be no double payment, or analagous ituation, because the bond account was in a worse state f depreciation when the bonds were sold than when the epreciation was allegedly bought in June, 1931.

The matters just discussed will be amplified as our rgument progresses.

Reply to Appellants' Preliminary Observations.

We must take issue with certain of appellants' Preliminary Observations (App. Br. pp. 13 and 14).

It is not true, despite appellants' repeated insistence to the contrary, that the pleadings raise but one issue—the "validity" of the alleged agreement between the bank and appellants. As heretofore pointed out by us, considerably more is involved. It is untrue that "appellee bases its whole case" on letters from the Comptroller to the Board of Directors that contributions to restore capital should be made unconditionally and without expectation of reimbursement, including a letter dated July 2, 1930, in respect to what appellants assert to have been an entirely different transaction without bearing on the issues in this case. Appellee bases its "whole case" on all the evidence adduced at the trial and upon which the trial judge made his findings of fact and conclusions of law. Appellants state that "no attack is made on the agreement of June 18, 1931 except the validity thereof, based upon the letters." This is not so. Respondent has denied that appellants ever entered into any such agreement as contended for by appellants [Tr. pp. 5 and 6, paragraph IV, and p. 51, paragraph IV], has denied the alleged total failure of consideration [Tr. p. 6, paragraph VII, and p. 51, paragraph VII], has denied any indebtedness on the part of the bank to appellants (*ibid.*), has denied any loan by appellants to the bank for the use and benefit of the appellants [Tr. p. 25, paragraph II, and p. 67, paragraph II], and in brief

as put in issue most of the important contentions of appellants.

Nor is it true that "the evidence, without contradiction r conflict, shows" the results claimed by appellants. In his connection we again invite attention to the fact that nly a part of the evidence has been brought up on appeal —such part, presumably, as appellants believe will lend upport to their contentions. Appellants confine themelves to quoting a part of one letter only from the Comproller and make references, wholly unjustified by the real acts, to another letter from him. It is purely gratuitous o assert that the directors and stockholders did not until 934 receive their first definite notice that the Comptroller vould not recognize their alleged agreement as valid.

These matters have in effect been decided against appellants by findings—unimpeachable in this appeal—of the rail court.

I.

Reply to Part I of Appellants' Argument.

We do not question the rule that directors of a bank can make a valid contract with it in the absence of fraud, bad faith or undue influence. What bearing, however, can this rule have on our appeal? A casual reading of the five assignments of error set forth on pages 15 to 18 of appellants' brief discloses that, in final analysis, they go, not to the question of fraud, bad faith or undue influence, but merely to the sufficiency of the evidence upon which the trial judge predicated certain of his findings of fact, and to the sufficiency of his findings to support one of his conclusions of law.

Apart from other difficulties, appellants run into this insuperable difficulty which at the outset we are constrained to urge, to-wit: that in order to attack the sufficiency of evidence and urge as error the absence of substantial evidence to sustain findings, all the material evidence must be incorporated in the bill of exceptions with the motion or request challenging the sufficiency of the evidence, the ruling of the court, and the exception thereto.

Obviously, there has been no attempt made to set out in the bill of exceptions all the material and relevant evidence received at the trial on the basis of which the trial court made the findings challenged by appellants here and elsewhere in their brief. Hence assignments of error Nos. 3, 4, 6 and 7 cannot be urged in this appeal.

U. S. v. Copper Queen Mining Co., 185 U. S. 495; 46 L. Ed. 1008;

Nashua Savings Bank v. Anglo-American etc. Co., 189 U. S. 221; 47 L. Ed. 782;

Krauss Bros. Lumber Co. v. Mellon, 276 U. S. 386; 72 L. Ed. 620;

Gurantee Co. of No. Am. v. Phenix Ins. Co. (C. C. A.), 124 Fed. 170;

Farinelli v. U. S. (C. C. A. 9), 297 Fed. 198;

Oregon-American Lumber Co. v. Simpson (C. C. A. 9), 8 Fed. (2d) 946;

Rasmussen v. U. S. (C. C. A. 9), 8 Fed. (2d) 948;

Mayer v. White (C. C. A.), 12 Fed. (2d) 710;

McHale v. Hull (C. C. A.), 16 Fed. (2d) 781;

North River Ins. Co. v. Guaranty State Bank (C. C. A.), 30 Fed. (2d) 881;

Stinson v. Business Men's Acc. Assn. (C. C. A.), 43 Fed. (2d) 312;

Hall v. U. S. (C. C. A. 9), 48 Fed. (2d) 66;

U. S. v. Densmore (C. C. A. 9), 58 Fed. (2d) 748.

In addition to the requirement that all the evidence, or ne substance of it, be set out in the bill of exceptions, here the question of sufficiency of the evidence is to be aised on appeal, the general rule requires that the bill ontain a statement over the judge's certificate that it contains all the evidence or at least all the material evidence:

Lesser Cotton Co. v. St. Louis etc. Ry. (C. C. A.), 114 Fed. 133;

Oregon-Am. Lumber Co. v. Simpson, supra;

Rassmussen v. U. S., supra;

Smith v. U. S. (C. C. A. 9), 9 Fed. (2d) 386;

Hall v. U. S., supra.

Not only does the record itself show that only parts of the testimony and only four of the exhibits have been brought up, but the judge's certificate [Tr. p. 142] does not pretend to state—as in fact it could not state—that the bill of exceptions contains all the material evidence offered and received on the trial, including all rulings made during the trial which were excepted to—in the form of certificate customary where insufficiency of evidence is to be urged before the appellate court.

As to appellants' assignment of error No. 10, predicated upon alleged error of the trial judge in making conclusion of law No. 1, only this need be observed: that such an assignment, in the words of *Gartner v. Hays* (C. C. A.), 272 Fed. 896,

> "presents nothing but the question whether or not the court's findings of fact sustain its legal conclusions."

If the findings are not reviewable or, being reviewable, are of themselves sufficient to support the conclusion of law complained of, no further inquiry will be made into such conclusion. In other words, the conclusions depend on the findings and if the findings stand and are of themselves broad enough to justify the conclusions reached, the inquiry is closed. We submit that a mere perusal of the extensive findings in this case—particularly findings Nos. IV, V, VII, X and XI [Tr. pp. 84-89]—will disclose that they amply sustain conclusion No. 1 which is challenged in assignment of error No. 10.

We also invite attention to the fact that in the trial court the appellants made no request for specific findings of fact or declarations of law before the case was submitted for decision by the court sitting without a jury. In this connection we invite attention to *Denver Live Stock Com. Co. v. Lee* (C. C. A.), 18 Fed. (2d) 11, and quote from page 14 thereof:

> "This court has many times set forth what it is necessary for counsel to do in the trial of a jury-waived case in order to preserve the right to have reviewed the question of the sufficiency of the evidence to support the finding or findings of the trial court. In the case of Allen, Collector of Internal Revenue, v. Cartan & Jeffrey Co. (C. C. A.), 7 Fed. (2d) 21, 22, this court said, quoting from the former decision in Wear v. Imperial Window Glass Co. (C. C. A.), 224 Fed. 60, 63:
>
> " 'They invite this court, in other words, to retry this case and to determine whether or not, under the applicable law the weight of the evidence sustains the finding and judgment. But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue *in favor of the requesting party*. No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special

finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, "for any error of fact" (Revised Statutes, Sec. 1011; U. S. Compiled Stat. 1913, Sec. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.'" (Citing numerous cases.)

See, also:

Lahman v. Burnes Nat. Bank, 20 Fed. (2d) 897;

American Surety Co. of N. Y. v. Cotton Belt Levee Dist., 58 Fed. (2d) 235.

Appellants cite a number of cases (App. Br. pp. 19-21) in support of the proposition that directors of a bank can make a valid contract with it in the absence of fraud, bad faith or undue advantage. We do not, as we have said, question this but frankly we fail to see what applicability it has here. No charge has been made that any officer or director or stockholder acted in bad faith. Borrowing some phraseology from *Utley v. Clarke,* 16 Fed. Supp. 435, at 438:

"In what is here said it is not intended to reflect upon the character of the parties involved. They were mortal men, nor more gifted with clairvoyance than other bankers or men generally. Like many others, they hoped for a return of better days, values, and banking conditions. But 'Hope deferred maketh the heart sick,' and disaster came at last with broken banks and broken men."

In any event, the question of good or bad faith would go erely to the sufficiency of the evidence, and the evidence s been passed upon by the trial court. The appeal record such that any alleged error in this respect cannot now be ged.

With reference, however, to the general merits of ap-llants' contentions we desire in passing to comment on *udley v. Citizens State Bank of Santa Monica, Booth v. elles, In re Hulitt* and *Yazoo State Bank v. Kimbrough* cause we believe that appellants feel that these cases have me special applicability to their situation.

Dudley v. Citizens State Bank, 103 Cal. App. 433, was action to recover money temporarily advanced by the aintiff to the defendant bank while plaintiff was an officer said bank and until the need for the money could be herwise taken care of by action of the directors of the nk. The court of course held he could recover it, but ry aptly adds this pertinent statement:

> "A review of the authorities cited by the respective counsel would serve no useful purpose. It is sufficient to say that *if the circumstances show a voluntary payment, or a payment under circumstances where the law implies a gift, no recovery can be had"* (p. 442) (italics ours.)

Booth v. Welles, 42 Fed. 11, involved a situation wherein e Comptroller of the Currency notified a bank that its pital was impaired but that it could continue business on e directors putting in $100,000 in cash and retiring that nount of objectionable securities. The money was put but the objectionable securities—which under the ar-ngement were to be segregated—were to the extent of out $35,000.00 never in fact segregated, and later on the

bank went into receivership. It was held that the bank was liable for the $35,000.00 as upon a debt. A comparison between the facts in that case and in ours shows a patent difference. We respectfully invite attention to the fact that in the *Booth* case no recovery of the $100,000.00 was sought; it was sought to hold the bank only in respect to the $35,000.00 in objectionable securities, being a part of the total of securities which were to be yielded up for the $100,000.00. When properly analyzed there is nothing in that case inconsistent with our contention in the instant case.

In *In re Hulitt*, 96 Fed. 785, certain stockholders of a bank paid an assessment made to comply with the Comptroller's requirement that an impairment in capital be repaired. The assessment was in fact invalid because made by the directors instead of by the stockholders. It was held that, the bank having gone into receivership, those stockholders who had paid their assessments in good faith were entitled to be treated as creditors as against non-paying stockholders and should be repaid the amounts so paid before a general distribution of remaining assets was made among all stockholders. That case is no authority for the contention of appellants here. The question was one merely of priority between paying and non-paying stockholders. There was no assertion that the paying stockholders had a right to come in on a parity with the general creditors of the bank.

In *Yazoo State Bank v. Kimbrough*, 127 So. 265, certain officers of a bank put up cash to take the place of notes which the bank examiner had rejected, it being agreed that such notes should be carried by the bank as a trust fund for the benefit of such officers and that the proceeds

the notes when collected should be distributed ratably them. It was held that the transaction amounted to a le of notes for cash at the face value thereof, and that deceased officer's legal representative was entitled to ecover his share of such of the notes as had been llected. Of significance to us, however, is the following atement by the court, at p. 267:

> "The bank assumed no obligation to make good any deficit or loss that the directors might sustain as a result of the failure to collect the notes."

In our case the appellants assume apparently inconsistent ositions: in one breath they say they bought the depreciaon in the bond account and want the appreciation in the epreciation of the bond account: and in another breath ey say they are entitled to recover the entire amount of eir contributions because the consideration for which id contributions were made has wholly failed.

If in fact they bought the so-called depreciation, they ought a very odd sort of uncertainty—like, for instance, e possible or hoped-for rise in a thermometer above me stated degree. As it turned out there was no rise—at is, appreciation—and the contributors simply lost out their gamble and hopes. For this the bank cannot be eld responsible. As said in the interesting and pertinent se of *Tyler v. Reynolds,* 197 S. E. 735, at page 739:

> "The depreciation of the bond account of the bank has not been and never will be recovered, the bank is hopelessly insolvent, a receiver is in charge of its affairs, its business is being wound up, its assets reduced to cash and distributed upon its indebtedness, and the corporation exists only for that purpose."

Nevertheless the contributors got what they were really most interested in, namely, keeping the bank open. It is ridiculous to say that the consideration wholly failed because the bank remained open for only two and one-half years after the alleged arrangement had been entered into. Their contributions—whatever the guise under which they were made—were, in words borrowed from the interesting case of *Delano v. Butler, Receiver of Pacific Nat. Bank,* 118 U. S. 634, at page 655:

> "the price paid for the privilege of continuing its (the bank's) business, in the hope of saving their investment. . . . The mistake, if any, is one for which each shareholder is alone responsible."

Considerably in point on the question of this alleged failure of consideration is the case of *Coast National Bank v. Bloom,* 174 Atl. 576 (N. J.), involving the collection of a note of defendant, a stockholder and director of the bank. The Comptroller of the Currency had, in view of depreciation in the bank's bond account, demanded that the assets be increased by a stated amount. The directors met this demand by establishing a fund, partly in cash and partly in promissory notes, including the note sued on. There was an apparent understanding among these directors and the bank that when the bond account returned to a market value which would no longer impair the capital, surplus and profits, the several sums advanced would be returned to them with interest. The defendant raised the defense that there was "a breach and frustration of" this agreement which discharged his obligation. This is referred to by the court and disposed of as follows:

> ". . . it is contended that 'an implied term of said agreement was that the bank should hold said bonds

and continue to do business, and that the sale of said bonds and the closing of the bank constituted a breach and frustration of said agreement, and that, in consequence thereof, the plaintiff has no legal right to enforce payment of the note.' The argument seems to be that a reasonable time for appreciation of the securities must have elapsed before a cause of action on the note accrued, and that the receivership made it 'impossible for the bank to perform its promise' in this regard. But this was clearly not an implied condition of the contract. The parties did not contemplate that the bond account should remain frozen, awaiting the day of equality between the market and the book values. . . . Moreover, it was a contribution to the capital fund to avert a closing and receivership, and it likewise was not within the contemplation of the parties that, if and when the day of misfortune should come, liquidation would be deferred indefinitely awaiting an appreciation of the securities. It is evident that, in that situation, this fund was to be instantly available for the payment of the bank's obligations, in the liquidation process. Incidentally, it is conceded that from the time of the giving of the note until the trial of the issue herein, a period of more than two years, the depreciation in the securities continued" (p. 579).

Not one of the cases cited by appellants is, in final analy-, applicable to our situation because in not one of them as there this controlling circumstance which is to be und in our case, to-wit: that the supervising government icial had at various times warned the contributors that yments to repair impaired capital must be considered as luntary and unconditional, without obligation of repay-ent (Finding of Fact No. XI).

Appellants insist (App. Br. p. 18) that their contributions "were not voluntary contributions," that "they were made to take up a deficiency in the bond account at the instance and request of the bank examiner" who was a representative of the Comptroller, and that "the consideration for the contributions made was the depreciation in the bond account." They admit, however, that "had it not been for such contributions the bank's capital would have remained impaired and under the National Banking Act the Comptroller of the Currency would have had to cause it to close its doors."

Whatever the bank examiner himself may or may not have suggested to the directors and officers, the Comptroller—the ultimate authority—had written them directly upon the point and warned them as above set forth. Such written instructions would obviously supersede any expressions on the part of the examiner. In this connection we invite attention to the following from *Anderson v. Akers,* 7 Fed. Supp. 924, at page 936:

> "The special master, while apparently recognizing the ultra vires character of these acts, thought that various statements of bank examiners in their reports, from time to time, to the Comptroller of the Currency, expressing satisfaction with the course of the bank in this connection, had the effect of relieving the directors from liability for those acts. I am unable to agree with this view. Assuming, as is found by the special master, that these statements of the examiners were brought to the attention of the directors, it

seems to me plain that such *statements merely represented the views of such examiners as individuals* and could not make proper what was, as a matter of law, ultra vires and therefore unlawful, nor affect the liability of such directors for permitting what they must be deemed to have known was unlawful" (italics ours).

We also invite attention to the case of *Bernard v. Emett State Bank,* 257 Pac. 949 (Kan.), which was a suit y a bank stockholder against the bank and receiver thereof o recover a sum he had paid as an assessment on his ock, the stockholder contending that, under the instructons of the deputy bank commissioner and the oral agreeent between the stockholders when the assessment was ade, to the effect that the funds so raised were not to be sed until all assessments were paid, his funds were illegally sed, certain stockholders never having in fact paid the ssessment and the bank soon afterward having closed its oors. Judgment went against the stockholder. On appeal ie court said:

". . . these matters, . . . we think are disposed of by the decision in the Needham case, above cited, on the theory that a bank assessment is absolutely voluntary. It is entirely voluntary with the stockholders whether or not any assessment be made. The bank commissioner cannot compel or coerce one to be made. He may close the bank if it is not made. It is an assessment on the stock and not on the stockholder, and, further, if it is made by vote of the

stockholders, it need not be paid. The stockholder pays the assessment only because he thinks the stock is worth more than the assessment. . . .

"It was held in the Needham case, above cited, concerning an assessment under this section of the statute, as follows:

" '*Payments made by stockholders to a bank in consequence of impairment of capital, with purpose or effect to repair breach in capital or to keep the bank a going concern, are voluntary payments, however induced.* . . .' Para. 2, Syl.

"The instances to which references are made as to inducements in said case are where the deputy bank commissioner told the stockholders the assessment would put the bank in good condition and they would not need any more assessments, and where two deputy bank commissioners were said to have told the stockholders that the assessment would keep the bank going and would avoid the double liability. These were the circumstances involved in the above case where the court held the assessment was voluntary nevertheless —voluntary as to the stockholders collectively in making the assessment, and voluntary as to the individual stockholder in paying it or letting his stock be sold without any personal liability being involved. 'The obligation to pay an assessment runs to the bank, and the stockholder who pays does so for the benefit and security of the bank as a going concern, and to keep it in operation.' Citizens' Bank v. Needham, *supra,* page 539 (244 P. 14)." (Italics ours.)

In the *Needham* case—*Citizen's Bank of Lane v. Needham*, 244 Pac. 7 (Kan.)—the court in discussing the effectiveness and voluntary character of assessments to make good impaired capital, despite pressure by the state bank commissioner and despite erroneous representations by him as to the result or effect thereof, makes the following interesting statements, on page 10:

". . . In practice he may induce assessment for that purpose by calling attention to his plenary authority. It is conceivable the suggestion may take the form of bald threat. Should stockholders act on the suggestion, whatever its form, and, pursuant to call, hold a meeting and levy an assessment, they act voluntarily. In a certain sense there is comstraint. *The constraint, however, lies in the impairment of capital stock, which must be made good if the bank is to continue in business.* . . .

"The stockholders contend they paid the assessments on their stock under representations of the bank commissioner or his subordinates that such payments would discharge double liability. . . . Conceding, for present purposes, that stockholders were advised, and relying on the advice believed, that payment of stock assessments discharged double liability, the advice consisted of *expression of opinion* concerning a matter of law. . . .

". . . *and payment of a stock assessment is none the less a voluntary payment because of ill-founded belief concerning effect of the payment* on double liability" (italics ours).

Before we conclude discussion of this phase of the matter, another case which is of interest should be noted. It is *Utley v. Clarke*—already referred—to an action involving an alleged loan to enable a bank to remain open. The complaint admitted that the plaintiff was requested to make the loan and did make the loan to the bank because the Comptroller required $25,000.00 to be added to the assets of the bank "in order to bolster up said assets, in default of which said bank could be closed." The court says that the plaintiff "must have known that, if its assets were to be increased by his $25,000 in securities, there could be no corresponding obligation to him shown on the books of the bank. The result was to give a fictitious representation of assets to liabilities." And it continues:

> *"While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is estopped from asserting his claim as against depositors and other creditors.*
>
> "Best, Receiver, v. Thiel, 79 N. Y. 15, 18, is a case in close analogy. Thiel, a director of the bank, gave a mortgage of $70,000 to one Hall, and the latter at Thiel's direction assigned it to the bank to enable it to keep open and continue business. The bank failed, and, in an action by the receiver to foreclose the mortgage, Thiel, among other defenses, asserted that the mortgage was without consideration, and therefore void. The court rejected all defenses and granted the foreclosure. The Court of Appeals said, upon the question of Thiel's liability:

" 'It was given expressly to make up the deficit in the assets of the bank and to enable it to go on with its business. It was reported to the banking department as a portion of the assets and was in effect represented to the depositors of the bank as a portion of the assets, and all this was done by the defendant and with his knowledge and assent. It was in consequence of this and other securities given by other trustees, that the superintendent of the banking department, acting officially for the public and all the creditors of the bank, permitted the bank to continue its business.

" 'It was in reliance upon this and the other securities given, that depositors were induced to make and leave deposits in the bank; and hence, upon the clearest principles of justice and morality, the defendant should be estopped from denying the validity of this mortgage.'

"If the mortgagor there was estopped from denying the validity of his mortgage, so the plaintiff here, who loaned his securities or his money for the like purpose of keeping open the bank of which he was director and stockholder when the obligation of the bank to him was suppressed, withheld, and concealed with his knowledge and assent, is likewise estopped from recovery against the receiver.

"There are many cases where directors and stockholders, to keep banks open, gave notes and other obligations and were held liable on the notes as given for a valuable consideration and estopped from setting up as a defense lack of consideration" (page 439) (italics ours).

In this connection attention is also invited to the case *Feliciana Bank & Trust Co. v. City Bank & Trust Co.*,) So. 600 (La.). Here, to satisfy the bank examiner,

an ostensible loan was made to a bank in failing circumstances, the amount being deposited to its credit in the defendant bank, but the failing bank executing a note therefor. This bank was ultimately taken over for liquidation. The court held that:

> ". . . the deposit must be regarded as having been what the president of the defendant bank pretended it was—'an absolute, unconditional, *bona fide* checking account.' He could not contend, successfully or with good grace, that it was only a sham, arranged to defeat the banking law, deceive the bank examiner, and impose upon innocent patrons of the bank (p. 602).

The court held that the side agreement, between the two banks, "was contrary to public policy and was void," and gave judgment for the bank liquidator who brought the action to recover the money so deposited to the credit of the failed bank.

See, also:

> *Reed v. Mobley, Superintendent of Banks* (Ga.), 157 S. E. 321.

So here, we repeat again, that whatever the pressure on appellants to find a formula for repairing the impaired capital and whatever advice may or may not have been given by the bank examiner, the assessments were—and as a matter of public policy must be regarded as having been—voluntary assessments, the prime consideration for which was the continuance of the bank in business and not the acquisition of the so-called depreciation in the bond account.

II.

Reply to Part II of Appellants' Argument.

This part of appellants' argument (App. Br. pp. 22-24) ppears to be directed to three points; first, that the Comp-oller's letter concerning voluntary and unconditional pay-ients was not binding because received subsequent to the lleged June, 1931 agreement; second, that in any event it as not binding on those contributors who were stock-olders only and not directors; and third, that the Comp-oller's letter of the year previous was not binding be-ause it had reference to an allegedly entirely different ransaction.

Here again, the argument is directed purely and simply o the weight and sufficiency of evidence. In the state of he record on appeal and under the authorities heretofore ited it cannot be considered by the appellate court.

Nevertheless, for good measure we will discuss certain hases of the matter which strike us as of interest.

The trial court found as a fact that

> "on various occasions and at various times between July, 1930 and November, 1931 said Comptroller of the Currency . . . notified and instructed said bank, and the officers and directors thereof, that payments made to repair the impaired capital of said bank *must be considered as voluntary and unconditional contributions, without obligation of repayment;* that each and all of said persons who made said payments . . . *acquiesced by lapse of time and otherwise in said notification and instruction* . . .; that *said payments were* payments made to repair the impaired

capital of said bank and were, each and all, *voluntary and unconditional contributions,* without any obligation whatsoever on the part of said bank to repay same; that *the law requires all payments such as those made by plaintiffs* under the circumstances shown by the evidence herein to be *voluntary and unconditional* and without any obligation whatsoever on the part of the bank to repay same" (italics ours) [Tr. p. 89, finding XI].

It must be obvious to anyone reading even the incomplete record that during the whole course of the capital impairment of the bank—all during the time it was a "live issue"—the Comptroller reiterated the above rule as to the character of the contributions. It is gratuitous and, we submit, unsupported by the complete records for the appellants to make the statement that the Comptroller took the position that contributions merely *should* be—not that they *must* be—voluntary, that the occasion for the Comptroller's similar warning a year before was "an entirely different transaction," and that stockholders who were not directors were not bound by such instructions because they did not see them. We have already amply discussed most of this but, with reference to possible want of knowledge of the Comptroller's instructions on the part of non-director stockholders, we wish to point out that the officers and directors of the bank represent the bank and its stockholders in its dealings with third parties, and where the officers and directors lull the Comptroller or the public into believing that a capital impairment has been repaired in the way required by public policy and the

omptroller, the bank's stockholders will not, as against ıe Comptroller or the public, be heard later to assert an ıconsistent and different position which in effect would ɛ violative of the Comptroller's instructions and prejucial to the public.

In this connection note what is said in *Morrison v. rice, Receiver,* 23 Fed. 217, at page 221:

> "In controversies between stockholders and third parties, it is well to bear in mind that a corporation is but the representative of its stockholders; that it exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect; and when the interest of the public, or of strangers dealing with the corporation, is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally or inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled, so far as it may inequitably affect him. Sawyer v. Hoag, 17 Wall. 610, 623. . . .
>
> "The purpose of the voluntary assessment was to restore the impaired capital stock, in order that the bank might reopen. The only alternative was for the bank to pass into the hands of a receiver. The stockholders decided to levy the assessment. This may have been bad judgment, but general creditors cannot suffer for that reason. If the reorganization of the bank had proved successful, the stockholders might have saved their property."

Utley v. Clarke, supra, is another pertinent case on this point. In that case, the plaintiff and defendant Clarke were both stockholders of a bank, Clarke being also president. Plaintiff, at Clarke's request, assisted the bank with certain of his securities to prevent it from being closed by the Comptroller. The court said, at page 440:

> "It is quite true that plaintiff may not have fully realized the effect of the way in which the loan transaction was carried on. He in all probability left everything to Clarke. That, however, does not excuse him.
>
> "Nor could plaintiff recover against the bank if Clarke failed to carry out representations made to plaintiff of the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using the $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or which plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed. Federal Reserve Bank v. Crothers, 289 F. 777, 779, *supra.*
>
> . . .
>
> "Clearly, plaintiff cannot recover as against the depositors and creditors of the bank."

Of interest in this connection are passages in the following decisions:

> *Page v. Jones,* 7 Fed. (2d) 541, at p. 545, and
>
> *Fallgatter v. Citizens Nat. Bank,* 11 Fed. (2d) 383, at p. 385.

III.

Reply to Part III of Appellants' Argument.

In this part of appellants' argument (Br. p. 25) Find-
g No. XIII (undoubtedly meant to be XII)—finding
at no evidence had been presented proving any appre-
tion in the value of the bonds in the bond account and
at no evidence had been presented of any legal damage
loss suffered by plaintiffs—is challenged on the ground
at it is contrary to the evidence, both oral and docu-
entary.

This point cannot, upon the authorities heretofore cited,
raised on appeal in the absence of a showing that all
aterial evidence on the point is before the appellate
urt.

As a practical matter, however, an examination of the
t itself of bonds referred to by appellants will show a
rther net slump and depreciation of about $136,400.00,
stead of an appreciation. We have already drawn atten-
n to this.

IV.

Reply to Part IV of Appellants' Argument.

How can it be seriously contended that appellants can predicate a legally tenable position for recovery on the statement that they "contributed to the fund for the purchase of said depreciation only as a loan to the bank, such moneys to be repayable to them by the bank, if and when the said bond account appreciated in value" (App. Br. p. 26)? If they *purchased* this vague and illusive thing called "depreciation in the bond account" there was obviously no *loan* to the bank.

Appellants of necessity admit that "it was the desire and intent and purpose of the appellants to aid the bank which was in distress due to an impairment of capital" (*ibid* p. 26). Well may we apply to this situation the words of the court in *Wright v. Gurley*, 63 So. 310 (La.), which was an action brought by seventeen persons who were stockholders and contributors to recover $40,000 remaining out of $98,000 contributed, after $58,000 thereof had been applied to the debts of the bank and the bank had been closed. The court held, contrary to the stockholders' contention, that the remaining $40,000 became part of the bank's assets and that the bank was not liable to them for its return; the court saying, at page 311:

> "The plausibility of this argument results from the substitution of the stockholders to the bank as the beneficiary of the donation. Very true the plaintiffs *did not intend to make a donation* to their fellow stockholders and did not do so; but they intended to and did make a donation to the bank. Their only purpose

in the transaction was that the bank should become the owner of the amount in question. Not the conditional owner, not the owner with a string to the gift, but the absolute, unconditional, untrammeled owner. *The contribution, coupled with a condition of any kind, would not have answered the purpose. The Bank Examiner had so informed the plaintiffs; and they understood perfectly, therefore, that they were divesting themselves now and irrevocably of this money* and investing the bank now irrevocably and unconditionally with it. The money became the unconditional and absolute property of the bank, with no liability whatever resting upon the bank for the return of it." (Italics ours.)

oubtless the contributors did not relish making their re-pective contributions, but this did not make them any the ss voluntary in legal contemplation. As said in *Andrews State ex rel. Blair, Sup. of Banks,* 178 N. E. 581 (Ohio) page 583:

"The superintendent's authority is to give the notice, and, if the deficiency is not made good, to take possession of the bank and its assets and proceed to liquidate. *However imperative the notice, however drastic the alternative may seem, any payment by a stockholder towards restoration is voluntary."*

nd finally, as said in the interesting case of *Broderick v. rown* (D. C., Cal.), 69 Fed. 497:

"The law is well settled that where stockholders voluntarily assess themselves to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the *advances thus made are not debts against but assets of the corporation.* . . . While

there is some conflict in the oral testimony as to the nature of the transaction which eventuated in the raising of the $50,000 of which defendant's payment of $20,500 was a part, careful consideration of all the evidence satisfies me that the advances thus made were *not loans but voluntary contributions by the stockholders,* for the betterment of their stock, and to enable the bank to resume business. . . .

"The only possible theory consistent with the situation of the bank and the circumstances of the parties is that the transaction was a voluntary assessment" (pp. 499 and 500).

"For the reasons above indicated, my finding is that the $20,500 mentioned in defendant's answer was a voluntary contribution for the betterment of his stock, and therefore is not a debt against the bank" (p. 501).

In discussing what appellants refer to as "The Equities in This Proceeding" they again become involved—improperly in the state of the record—in a discussion of the evidence. Only certain items of evidence are referred to and these they interpret in their own way and contrary to the way in which the trial judge interpreted them. Though we are tempted to challenge certain flagrantly erroneous statements of what the evidence was—for instance, that the so-called agreement "was signed by the proper officers on behalf of the bank" (Br. p. 26), when in fact there was obviously no such signing—we shall limit ourselves merely to inviting attention again to the rule that alleged errors predicated upon insufficiency of evidence cannot in the state of this record be urged on appeal.

Furthermore, appellants cannot now be permitted to rgue this case "as a case in equity, rather than a case at aw" (Br. p. 27). Such would amount to a change f theory on appeal. The action was filed as an action at .w, was tried as an action at law, and was appealed as an ction at law. Such change of theory is not permissible:

Ford Motor Co. v. Farrington (C. C. A. 9), 245 Fed. 850;

Bovay v. Fuller (C. C. A.), 63 Fed. (2d) 280.

No statement of the evidence, as required by Equity ule 75, has been prepared or filed; and such would be ecessary if this were an appeal on the equity side.

Appellants are foreclosed from arguing the alleged errors eferred to in this part of their brief for the further eason that their assignment of errors contains no assignent of such alleged errors. The rule is well established hat the party complaining of the action of the lower court ust lay his finger upon the point of objection, and must and or fall upon the case he has made in the court below. ppellate courts are not the proper forum for the discusion of new points. They are simply courts of review to etermine whether the rulings of the court below, as prented, are correct or not:

Walton v. Wild Goose Min. Co. (C. C. A. 9), 123 Fed. 209.

We cannot refrain from commenting on appellants' atement (Br. p. 27) that "appellee contends that this greement was unlawful" and on appellants' argument redicated upon that statement. Appellants would appear contend that appellee's defense in the lower court was

predicated upon unlawfulness of the agreement. The fact is, and the pleadings so disclose, that the real question was whether or not an agreement of the sort, force and effect contended for by appellants had been entered into; and only incidentally did the question arise as to whether such an agreement, if actually entered into, would be unlawful. Appellee took the position that it would be unlawful. The trial court found that no agreement of the sort, force and effect contended for by appellants had in fact been entered into [Tr. pp. 84-85, Findings IV and V]. The court made, and we believe properly, a finding that "the law requires all payments such as those made by plaintiffs under the circumstances shown by the evidence herein to be voluntary and unconditional and without any obligation whatsoever on the part of the bank to repay same" [Tr. p. 89, Finding XI].

It is strange that appellants, after contending all the way through this case that there had been a lawful agreement, now take the position that the agreement may forsooth have been unlawful, that therefore "it was void from its inception," and that under the theory of unjust enrichment they are entitled to recover their money. This cannot now be urged for the first time.

Incidentally, in speaking of equities: is not the position of the general creditors of this insolvent bank, who relied upon and had full right to rely upon an unimpaired capital, much closer to true equity than the position of officers and stockholders of the bank who must, as a matter of public policy, be held responsible for the unfortunate financial debacle?

To the authorities heretofore cited by us let us add *Heath v. Turner,* 77 S. W. (2d) 9 (Ky.), noting what is said on pages 11 and 12:

> "Notwithstanding banks are organized and operated by individuals for private gain, they are in a sense public institutions, since they are depositories of the money of the country, and therefore are legitimate and proper objects of police regulation to preserve and safeguard their solvency. . . . The capital stock of a bank is in the nature of a trust fund for the protection and benefit of its depositors and creditors. It is therefore highly important that such fund be kept unimpaired. . . .
>
> ". . . Regardless of the equities between the other stockholders of the bank and the makers of the notes (themselves stockholders), and the effect of the agreement as between them, a matter which it is unnecessary for us to determine, the agreement could not and did not operate to thwart and nullify the policy of the law to the prejudice of the creditors and depositors. They were entitled to have the capital stock remain unimpaired. . . ."

Appellants' argument on the alleged "void" and "unlawful" agreement and on the alleged "equities" recalls to us the following pertinent passages from *Andrews v. State, ex rel. Blair, Supt. of Banks,* 178 N. E. 581, at page 583:

> "If the stockholders were mistaken about either facts or law, the mistake cannot be charged to the creditors;"

and from *Duke, Supervisor of Banking, v. Force,* 208 Pac. 67 (Wash.), at page 74:

> "The payments which the stockholders made resulted in the Scandinavian-American Bank continuing to function for a period of over a year thereafter as a bank. Additional liabilities were incurred, as the pleadings in these cases show, and, of course, the depositors changed their relationships relying upon the addition made by these stockholders to the funds of the bank. The bank's customers entered into new obligations, and the status of the business of the corporation was materially affected as a result of these payments. New contracts, debts, and engagements accrued. Were the question only between the corporation as such and these stockholders, it would be different from the question which is now presented between these stockholders and the creditors. After having been compelled to make an involuntary and illegal payment, a stockholder, if he had acted promptly, would be allowed to recover the amount of such payment, but after the rights of creditors have been affected, new creditors come into existence, and old creditors have changed their status, it is too late for the stockholders, after the result has proven that the assessments they paid in anticipation of a successful corporate life were unsuccessful, to now assert their rights, and they must be held to be estopped by their conduct from that assertion."

nd in *Schwenker, Com'r of Banking, v. Reedal,* 236 N. W. 603 (Wis.) (rehearing denied 238 N. W. 289), it was eld that a private understanding or agreement among the ank's stockholders signing a declaration—in connection ith their responsibility for the bank's debts—that the gning shall be conditional cannot affect their liability ereon to creditors after the same has been signed and ed as provided by the banking law.

The fact is that appellants, as contributors to the fund repair impaired capital, obtained what they were after, amely, keeping the bank from being closed by the Comptroller. In this they succeeded for a period of two and a alf years commencing June, 1931. It is unfortunate for l concerned that the bank did not keep open permanently. hat was the chance these contributors took. They might e called upon again to repair impaired capital, just as they ere called upon to do so in 1930 and in 1931. As it was, ey received ample consideration—more than is often the se with similar contributions made to extend life to a stressed bank.

Wright v. Gurley, 63 So. 310 (La.);

Interstate Trust & Banking Co. v. Irwin, 70 So. 313 (La.);

Union Bank of Brooklyn v. Sullivan, 108 N. E. 558 (N. Y.);

Skinner v. Rich, 55 Pac. (2d) 1146.

V.

Reply to Part V of Appellants' Argument.

In addition to other defects, based on matters heretofore discussed by us, the first two assignments of error appearing on page 29 of appellants' brief have the further inherent vice of being too intangible and indefinite to warrant serious attention by the appellate court.

By assignment No. 1 appellants complain merely that the Minute Order determining and ordering findings and judgment for defendants "was not in accordance with the law and the facts of the case." Circuit courts have repeatedly refused to consider, as being too uncertain and indefinite or as not in compliance with the rule of court, the following similarly defective assignments: that the verdict is contrary to the law or the evidence or both: *McClendon v. U. S.*, 229 Fed. 523; *U. S. Shipping Bd. v. Drew*, 288 Fed. 374; *Lahman v. Burnes Nat. Bank*, 20 Fed. (2d) 897; *Allen v. Hudson*, 35 Fed. (2d) 330: that the verdict and judgment are unsupported by the evidence: *Hecht v. Alfaro*, 10 Fed. (2d) 464 (C. C. A. 9): that the court erred in rendering judgment for the defendant: *U. S. v. Bowling*, 261 Fed. 657: *U. S. v. Atchison, etc. Ry. Co.*, 270 Fed. 1; and *Arkansas etc. Co. v. Stokes*, 277 Fed. 625; that the court erred in making findings of fact: *Gartner v. Hays*, 272 Fed. 896; that the court erred in making a finding and entering judgment for plaintiff: *Flanagan v. Benson*, 37 Fed. (2d) 69: *McCarthy v. Ruddock*, 43 Fed. (2d) 976 (C. C. A. 9); *McCaffery v. Elliott*, 65 Fed. (2d) 792.

By assignment No. 2 appellants complain merely that "the Minute Order of the Court denying plaintiff's Motion for a New Trial was not in accordance with the law." The

ower court heard plaintiffs' motion for a new trial and denied it. Such action was discretionary. It is not stated n the assignment that the court abused its discretion, nor s there any argument whatever directed to that point. An assignment of this sort presents nothing for review and will not be considered on appeal:

O'Brien v. General Acc. etc. Corp., 42 Fed. (2d) 48;

Van Stone v. Stillwell etc. Co., 142 U. S. 128;

Ill. Cent. R. Co. v. Horace Turner Corp., 9 Fed. (2d) 6;

Terzo v U. S., 9 Fed. (2d) 357;

Alvarado v. U. S., 9 Fed. (2d) 385 (C. C. A. 9);

Sun Oil Co. v. Gregory, 56 Fed. (2d) 108.

Assignments Nos. 11 and 12 are predicated upon alleged errors of the trial judge in reaching certain conclusions of law. Such assignments, as heretofore pointed out, present nothing but the question whether or not the findings of fact are of themselves sufficient to sustain the conclusions of law based thereon. We refer back to our discussion of this point in our reply to part I of appellants' argument.

Of course part V of appellants' argument is subject to the same fatal objection as is most of their argument. Where insufficiency of the evidence is the basis of the objection all the material and relevant evidence received on the trial must be set out in the bill of exceptions; and the bill must contain a statement in the judge's certificate that it contains all the evidence or at least all the material evidence.

It might be added that the Circuit Court of Appeals, in reviewing a decision of the District Court, starts with the presumption that no error was committed in the lower court; the burden being upon the appellant to show prejudicial error.

Southern Ry. Co. v. Lester, 151 Fed. 573;

Harris v. Moreland Truck Co., 279 Fed. 543 (C. C. A. 9).

And we might also repeat the cognate rule that in those cases where all the material evidence is not brought up in the record on appeal, by a proper bill of exceptions, statement of the evidence or agreed statement of ultimate facts, the appellate court will presume that there was sufficient evidence to sustain the verdict, findings of fact, or judgment. The same presumption will be indulged in whether the record is devoid of proper evidence, or contains only a portion thereof:

Harris v. Moreland Truck Co., supra;

U. S. v. Stephanidis, 47 Fed. (2d) 554.

In concluding part V of their argument appellants again change the theory of their case. They ask for an accounting and appear to throw into the lap of the appellate court the question whether this is an equitable or legal case. Not only is this change of theory not permissible but clearly, in view of the entire case, there is no legal basis whatever requiring or justifying an accounting.

Appellants repeat that we contend the agreement was unlawful. We have, we believe, already sufficiently explained our contention and there is no need further to go into the matter.

Conclusion.

In our argument we have not intended to limit ourselves to the objectionable features of appellants' argument arising out of their failure to make and present such a record as would permit the appellate court to consider questions of sufficiency of evidence. We have also sought to show that there is in fact no practical or genuine basis for any of appellants' contentions, even making allowances for the insufficient record; it being our firm belief that even if the appellate court had before it a more complete record of the trial there could be no other or different decision than that reached by Judge James. It is, of course, practically impossible to find in the reported cases a case exactly similar as to facts. However, cases of the sort cited by us in this brief, clearly show the correctness of the judgment rendered under the circumstances of the instant case.

We contend and urge that the judgment of the District Court should be affirmed.

Respectfully submitted,

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HENRY I. DOCKWEILER,
Attorneys for Appellee.

Of Counsel:

GEORGE P. BARSE,
J. L. ROBERTSON,
Attorneys for Comptroller of the Currency.

No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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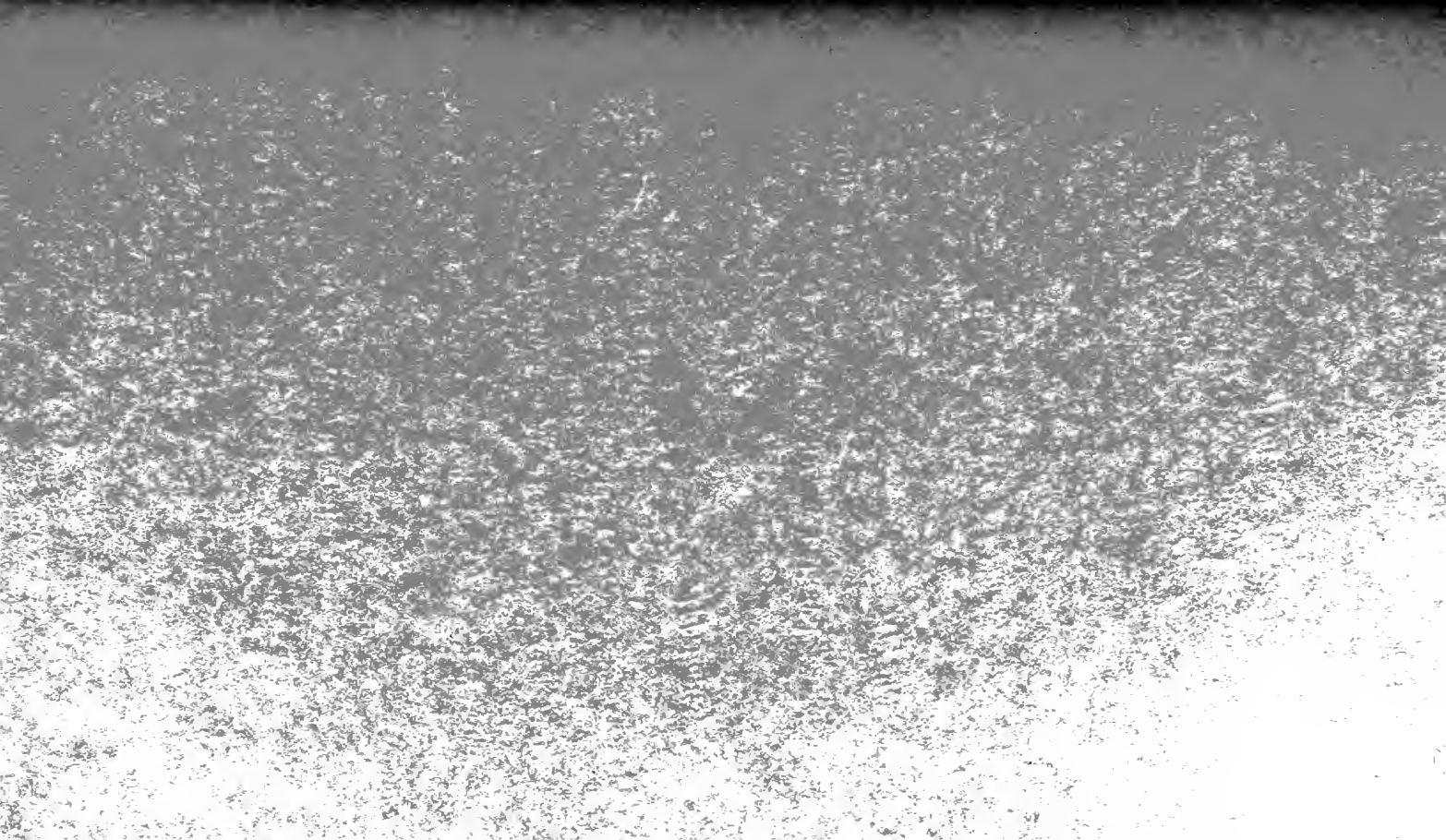

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In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

Reading the somewhat technical statements contained in appellee's brief, commencing at the first and ending with the conclusion thereof, on page 50, we find such a mixture of surmise, conjecture, statements of matters and references to exhibits not in the record, and conclusions of the writers not supported by the record, and references to matters which have no connection with, or bearing upon, the issues involved in this appeal, that it will be difficult

to confine ourselves to a reasonably short reply which would not be onerous to this Honorable Court. We shall, therefore, confine ourselves to a brief rebuttal of the points which appellee attempts to make in the reply brief.

The record discloses that upon this appeal appellants have based their respective claims against the bank upon the agreement with the bank. The record shows:

(a) That on June 18, 1931 the directors of the said bank held a meeting whereat it was agreed that certain of said directors should act as a committee to collect the sum of one hundred and seventy-five dollars per share from stockholders, to be used to purchase the depreciation in the bond account of the bank;

(b) That in compliance with the action of the board of directors at the meeting held on June 18, 1931, the appellants, and certain other stockholders, subscribed the required amount of money at one hundred and seventy-five dollars per share, to purchase said bond depreciation.

(c) That on the 17th day of July, 1931, a meeting of the board of directors of said bank was held, and the amounts so subscribed by the stockholders were allocated to the purpose of taking up five notes in the amount of six thousand dollars each, formerly placed in the bank's assets by certain stockholders on account of bond depreciation, and that the balance was to be applied directly against the bond depreciation, thus reducing that depreciation by one hundred ten thousand, six hundred and fifty dollars;

(d) That by the agreement entered into, in compliance with the recommendation of the directors at the meeting held on June 18, 1931, the intent and agreement of the subscribing stockholders was that

interest received from the bonds equalling the amount of depreciation purchased be set aside for the use of the subscribing stockholders, and that an appraisal of the bond account was to be made each six months, when any decrease in the depreciation (if any) should be divided *pro rata* among the subscribing stockholders;

(e) That the recommendation, agreement and disposal of the money subscribed, was at the instance of R. Foster Lamm, the then bank examiner, duly appointed by the controller of the currency;

(f) That on August 20, 1931, after the subscriptions had been made and the funds disposed of, the board of directors of the bank were notified by the deputy controller of the currency that their subscriptions should be made unconditionally, and without expectation of reimbursement;

(g) That the said bank examiner, R. Foster Lamm, informed the said directors prior to the time when said subscriptions were made that by entering into such an agreement they would be buying the depreciation in the bond account, and that the *same procedure had been followed prior to that time, namely, in 1929, by First National Bank of Huntington Beach, California;*

(h) That the controller of the currency at no time disapproved of the procedure followed by the First National Bank of Huntington Beach, California;

(i) That the controller of the currency did not disapprove the repayment to the stockholders of the First National Bank of Anaheim, California, of the sum of thirty thousand dollars, subscribed by them in compliance with the resolution passed at the meeting of its board of directors on the 29th day of May, 1930.

New Rules of Civil Procedure Are Applicable to This Appeal.

Rule 86 of the New Rules of Civil Procedure follows, in substance, Equity Rule 81 and makes the new rules applicable to all cases wherein appeal was taken subsequent to September 1, 1938, as well as all further proceedings in appeals pending, *except* when their application in a particular action would not be feasible or would work injustice.

Statement of Case.

Appellants do not contend that the transcript of record contains all of the evidence adduced at the trial, as to do so would be contrary to the rules of this court, but in our opinion it contains the narrative of *all the evidence as required* by the *rules*. We invite attention to the fact that the appellee had its opportunity under Rule 75 (a), to serve and file a designation of additional portions of the record, proceedings and evidence to be included, if he so desired.

We further invite the attention of this court to the fact that the reporter's transcript of testimony and proceedings on trial is on file in the District Court and may be brought up if, in the opinion of this Honorable Court, it is considered necessary. We do contend, however, that the transcript of record in this case contains all the portions of the record, proceedings and evidence material to the questions involved in this case.

We are at a loss to understand where the appellee received the information in this case that the only time the plan for purchase of a bond depreciation was used was in the case of the First National Bank of Anaheim and in

connection with the First National Bank of Huntington Beach, as stated on page 5 of the reply brief. This statement is not supported by anything which we have found either in the reporter's transcript or in the transcript of record.

We direct this Honorable Court's attention to the fact that, although R. Foster Lamm testified that he had not received the approval of the controller of the currency to the said plan, he further testified that the controller *had never disapproved said plan.* In fact, he testified that he set the plan forth in connection with the First National Bank of Huntington Beach, California, in the year 1929, and asked for their approval or disapproval, but that he never received an answer from the controller's office. [Tr. p. 105.] Since the controller's office knew that such a plan had been put into effect and never disapproved it, it is to be taken that the plan was stamped with the controller's approval.

The appellee contends, on page 6 of the reply brief, that there was notification and instruction by the Controller to the board of directors that subscriptions of that nature were to be viewed as voluntary contributions. We insist that this is not true. No place in the transcript of record has such appeared to be the fact. True it is, as we set forth in our opening brief, page 24, that he advised the directors that "contributions made to restore capital *should* be made unconditionally and without the the expectation of reimbursement". This, if Your Honors please, is not an instruction.

We must take issue with the appellee upon the statement appearing on page 7 of the reply brief that the approval of bank examiner Waldron is a conclusion based

merely on a statement by Dolan, the president of the bank, that "Waldron seemed to think that this was O. K." The testimony of Mr. Dolan on that point is as follows:

> "* * * I think that later on, after the money had been put up, Mr. Waldron was the successor of Mr. Lamm in our territory and I told him what we had done; and *the records show that Mr. Waldron approved our action.*" [Tr. p. 107.]

Appellee in the quotation from Mr. Dolan's testimony, as given above, fails to set forth the complete testimony of Mr. Dolan appearing in the transcript of record. We therefore quote the true testimony of Mr. Dolan:

> "I told him that Mr. Lamm had suggested that the directors and some of the stockholders purchase the bond depreciation and if the bonds appreciated, why, we were to be able to get our money back; and Mr. Waldron seemed to think that that was O. K. He said—
>
> Q. Not what he seemed to think. What did he say? A. He said he did not see why it would not work out all right; *and he said to go ahead*, and on the—I think it was June 22nd, I wrote the Controller of the Currency to that effect." [Tr. p. 107.]

Contrary to the statement of appellee (Resp. Br. p. 9), the appellants have made no pretensions throughout their opening brief. We believe this Honorable Court to be well able to distinguish the real issues before the trial court, and can, therefore, see no reason to enter into a lengthy argument regarding the same. However, it is certain both from the transcript of record and the reporter's transcript that the appellee has no grounds what-

ever for its statement that part of that issue was "whether or not *such an agreement could legally be made in the face of the prior, concurrent and subsequent warnings of the controller of the currency to the bank* that payments made to repair impaired capital must be considered as voluntary and unconditional contributions. * * *" (Resp. Br. p. 9). As the appellants stated in their opening brief the controller of the currency at no time advised them, in regard to this transaction, that such payments must be considered as voluntary and unconditional contributions. At best, the controller's notification to the board of directors of the bank was merely that they *should* be made unconditionally and voluntarily, and that advice was subsequent to the transaction. At no place throughout the transcript of record or reporter's transcript is it shown that there was any *concurrent* advice from the controller of the currency to the board of directors on the question. We cannot stress too greatly the fact that the prior advice as to these matters was addressed to the board of directors in regard to a totally different transaction, one year prior to the time that the agreement involved in this transaction was entered into, and at no time has the controller complained of the fact that the very contributions made at that time were in fact repaid. [Tr. p. 120.]

On page 10 of its brief the appellee seeks to lightly dismiss the case of *Yazoo State Bank v. Kimbrough*, 127 So. 265, as being no authority for appellants' statement that agreements such as the agreement entered into in this case to repair impaired capital of a national bank are valid. However, there is no pretension of explaining why such a statement is made, so we shall pass over that contention for the time being.

Appellee, apparently, disregards the statement of the controller of the currency contained in his letter of July 2, 1930, in regard to a different transaction (Defendant's Exhibit "F,") that "* * * or *purchase for cash of the assets estimated by the examiner as losses.*" The above quotation is one of the ways set forth by the controller of the currency for the impairment of capital of a national bank.

Appellee makes the broad statement that the position of the stockholders is no different from the position of the board of directors. Quoting from the syllabus of one of the cases which they, themselves, cite, *i. e., Utley v. Clarke,* 16 Fed. Supp. 435, we invite Your Honors' attention to the following:

> "3. Evidence: Vice president and director making loan to remove impairment of bank's capital, as regards right to recover on bank's insolvency, was not chargeable with knowledge of deposit of his check for same amount to credit of surplus funds of bank, *nor of letters written by president to Controller of Currency regarding transaction.*"

Thus, it is evident that the stockholders are not bound by what their directors do in the management of the bank.

Appellee attempts to gloss over appellants' point IV, lightly. While it states that the case of *Skinner v. Rich,* 55 Pac. (2d) 1146, "is hardly an authority for Appellants' contention," and goes into an analysis of certain of the facts of that case and quotes portions thereof, a mere reading of the case will show that it is in fact definitely in point with the case at bar.

The same is true as to appellee's contention in regard to the case of *Eisele v. First National Bank*, 137 Atl. 827, on page 14 of reply brief.

In regard to the various statements and denials of the appellee appearing on pages 15 and 16 of its brief, appellants feel that the evidence itself, which is set forth in the transcript of record, is the best answer. We do not see how the appellee can deny that the agreement was entered into in the face of the agreement itself, as embodied in plaintiff's Exhibits 1, 2 and 4 [Tr. pp. 118-121, incl.].

In the first 16 pages of his brief, appellee has repeatedly contended that only a part of the evidence has been brought up on appeal, and repeatedly implies that the evidence brought up on appeal is only such as appellants believe will lend support to their contentions. This is false. A reading of the reporter's transcript of the evidence will show that the transcript of record is a complete synopsis of the case, and if this Honorable Court deems it necessary, we shall respectfully request permission to prove the truth of this statement by having the reporter's transcript of the evidence made a supplemental part of the transcript of record.

The appellee concedes that directors of a national bank can make a valid contract with it in the absence of fraud, bad faith, or undue influence (Resp. Br. p. 17). A reading of the transcript of record will show that this entire case was based upon just that contention on the part of the appellants.

In regard to the cases cited by appellee on pages 17 to 21, incl., of the reply brief, we invite this Honorable

Court's attention to the fact that not one of these cases is in point with the instant case.

The appellee quotes a short portion of the opinion from the case of *Dudley v. Citizens' State Bank,* 103 Cal. App. 433, as a reason why that case should not be applicable to the instant case. Counsel for appellee has italicized a portion thereof. We submit that the whole case, and not a mere few sentences taken from it, show the true significance of that decision. The circumstances in the instant case do not show a voluntary payment, or a payment under circumstances where the law implies a gift, but, on the contrary, show a loan made by certain directors and stockholders of the bank under a valid agreement with the bank, setting forth the means by which they were to receive the return of the money thus advanced for the benefit and use of the bank.

Appellee, on pages 22 and 23 of reply brief, suggests that an analysis of the cases cited by appellants in their opening brief shows facts inconsistent with those of the case before this court. We cannot agree with appellee that such is the case. We, therefore, invite an analysis of each and every one of the cases cited by the appellants in their opening brief which, we contend, are strictly in point, and closely akin to the circumstances and facts of the case at bar.

Appellants fail to see where the cases of *Tyler v. Reynolds,* 197 S. E. 735; *Delano v. Butler, Receiver of Pacific National Bank,* 118 U. S. 634, and *Coast National Bank v. Bloom,* 174 Atlantic 576 (N. J.), are in any way applicable to the set of facts and circumstances existing in this case on appeal, or how they are in point.

On page 26 of the reply brief, appellee again urges a so-called warning to the subscribing directors and stockholders by controller's office that payments to repair capital must be voluntary and unconditional, without obligation of repayment. We submit that the transcript of evidence and the record in this case will show this statement to be false and we see no use in repetition of argument on that point.

That same argument is used on page 27 of the reply brief cleverly implying that such a "warning" as they contend was given would supersede any instructions of the bank examiner. But, it is to be remembered that the instructions of the bank examiner were given in regard to this transaction alone, and that the communications from the controller's office applied only to a prior and different transaction in the one case, and, otherwise, were given subsequent to the time the subscriptions were made in this transaction.

In regard to the case of *Anderson v. Akers*, 7 Fed. Supp. 924, and the quotation appearing therefrom on page 936 (Resp. Br. p. 27), we submit that this case can have no bearing whatever upon the case at bar for the reason that in our case, as has been definitely shown, the directors had the power to enter into a valid agreement, while the *Anderson* case, as is shown by the quotation itself, was one in which the acts were *ultra vires*. And the very portion of the case quoted shows that the decision was predicated upon the fact that the acts were *ultra vires*, as the justices on that case say: "* * * and could not make proper what was, as a matter of law *ultra vires*, and therefore unlawful, * * *."

Bernard v. Emmett State Bank, 257 Pac. 949, is a case revolving around the matter of assessments and has nothing to do with any agreement such as in involved in this case.

In regard to appellee's remarks anent this case being one in equity or one in law, we respectfully insist that under Rule 18, subsection (b) in a single action a party should be accorded all the relief to which he is entitled, regardless of whether it is legal, or equitable, or both.

Counsel for appellee, on page 43 of the reply brief, apparently take it upon themselves to represent the general creditors of the bank. Since the general creditors (if any there be) were neither concerned with this case in the District Court, nor appear as parties in the case on appeal, we do not see any reason to enter into a discussion of the matter.

Having read the various cases cited and quoted from by appellee, we fail entirely to see how any one of them has a bearing on the instant case. Not one of those cases involves an agreement such as existed in the present case and in none of them did such a set of facts and circumstances exist as in the case at bar. Some of the cases are so far from being in point that we can see no reason for their citation. As an instance of this we draw to the court's attention the fact that in the case of *U. S. v. Stephanides, et al.,* 47 Fed. (2d) 554 (Resp. Br. p. 49), there was no bill of exceptions settled and allowed. As said by the court in that case: "Consequently, the only

question open for our consideration is whether the judgment could properly be rendered under the pleadings."

Wherein in the reply brief has appellee contravened the logic of the various cases cited by appellants in their opening brief or shown that those same cases are not in point? In each instance they have glossed over the case with the mere comment that it is not in point. In the case of *Yazoo State Bank v. Kimbrough,* 127 So. 265, 157 Pac. 149, appellee sets forth a small portion to bear out a point. However, they fail to set out the entire portion bearing upon that point. Lest, at first glance, it would seem to favor the contention of the appellee, the whole portion from which the quotation was taken follows:

> "The three cases relied upon by the appellants and cited above, held that 'when the directors of a bank in response to a demand of the State Bank Examiner, make good an impairment of the capital stock, sign and discount their personal note and deposit the proceeds to the credit of the bank, the transaction is a donation or a gift to the bank; *but, on its facts the case at bar is distinguishable from these cases. The arrangement consummated in this case was, in effect, a sale of the notes to these directors for cash at the face* value thereof. In so far as the effect of the transaction on the bank and its assets is concerned, it was the same as if the makers of the notes in question had paid them in full to the bank. The bank assumed no obligation to make good any deficit or loss that the directors might sustain as a result of the failure to collect the notes. It merely received in cash

> the full face value of securities of doubtful value; and this was all it could have demanded or received from the makers of the notes. The directors who took over these doubtful securities assumed all of the risk of realizing thereon, and by this transaction there was no possibility of benefit to them or loss to the bank, *and there can be no good reason why they should not receive the proceeds of the notes so, in effect, purchased by them.*"

A reading of that case will demonstrate its applicability to his case, and the same is true of each and every other case cited in our opening brief.

If the agreement was in contravention of law as appellee contends then appellants have a right of recovery of the respective amounts of their subscriptions since there was a total failure of consideration.

It is a firmly established legal principle that a contract made in contravention of law, whether it be of statute, ordinance, or otherwise, or the performance of which requires the violation of such laws, is illegal and such a contract is void, whether the parties knew the law or not. The appellee denies that appellants ever entered into the agreement with the bank. (Resp. Br. p. 15.) Plaintiff's Exhibit 4 [Tr. pp. 120-121, incl.] shows that it was their intent to do so and thought that they had. The bank accepted their subscriptions and the use and retention thereof. Very well then—if there was no such agreement because it would be in violation of law, or lacked one of the essential elements of a valid contract, that is a lawful

object, then the appellants have a right to recover the amounts of their respective subscriptions since such a contract would be void *ab initio.*

Industrial D. & L. Co. v. Goldschmidt 56 Cal. App. 507, 509;

6 *R. C. L.* at pp. 692, 694, 699;

Texas Co. v. Bank of America, 5 Cal. (2d) 35;

Wood v. Imperial Irrigation Dist., 216 Cal. 748;

Silverthorn v. Percey, 120 Cal. App. 83;

Construction Co. v. Fed. L. V. Ins. Co., 5 Cal. App. (2d) 16.

Multiplying authorities is useless.

Conclusion.

We respectfully request this court to reverse the judgment and decree of the District Court. We can see nothing in appellee's brief but an attempt to evade the issue. In our opinion the cases cited therein do not contradict appellants' position. The cases cited in appellants' opening brief cannot be thrown to the winds and disregarded by evasion or an attempt to fall back on technicalities. The Appellate Court by the New Rules of Federal Procedure and its own attitude has broadened the somewhat harsh rules which permitted cases to be dismissed upon pure technicalities and has made it possible to administer substantial justice.

The closing statement in appellee's brief shows the weakness of its position. We respectfully submit that even if the record were incomplete (which we strenuously

deny) under Rule 75, subdivision (h), the Appellate Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the District Court. No demand by appellee for exhibits or letters which would presumably bear out the contentions made in the reply brief is shown by the record. Appellee had available the processes of the court to obtain access to any letters or other documents in the possession of, or under control of the appellants and appellee's council has made no such demand.

We refrain from lengthening this brief, except to comment that the surmises and conjectures of appellee have no place in a brief in this court and can avail nothing for they must be disregarded.

Respectfully submitted,

EDWARD C. PURPUS,
Attorney for Appellants.

No. 9020.

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L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

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Appellee.

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Appellants,

vs.

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Appellee.

APPELLANTS' OPENING BRIEF.

(Note: Herein for the sake of brevity, we shall refer to L. J. Kelly, F. H. Dolan, Ben Baxter, S. James Tuffree, Ed Kelly, F. A. Yungbluth, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw and J. J. Dwyer, as the appellants; to the Anaheim First National Bank, a national banking association, as "The Bank;" and to J. V. Hogan, Receiver of the Anaheim First National Bank, a national banking association, as "The Receiver.")

(It is to be noted that where "R." is used it refers to the original Transcript of Record, and where "S. R." is used it refers to the Supplemental Transcript of the Record.)

JURISDICTIONAL STATEMENT.

This action was instituted by the appellants as plaintiffs against the appellee as defendant in the Superior Court of the State of California, in and for the County of Orange [R. 4] and was filed in said Superior Court on the 11th day of January, 1936 [R. 35]. Thereafter on the 15th day of February, 1936 [R. 40] the receiver herein filed petition for removal of cause to the United States District Court, Southern District of California, Central Division [R. 36] under Judicial Code, section 24, sub-section 16 (U. S. C. A., Title 28, Section 41, Sub-section 16) and Judicial Code, sections 28 and 29 (U. S. C. A., Title 28, Sections 71-72) [R. 38]. Notice of removal [R. 41] having been given, and bond filed [R. 42], the Court made the order of removal to the District Court of the United States, Southern District of California, Central Division [R. 45], and a motion to remand [R. 47] was made and denied [R. 47]. This action was brought by the appellants as plaintiffs against the Bank to recover the following amounts, to-wit:

(a) For appellant, L. J. Kelly, the sum of $4,900.00 [R. 33];

(b) For appellant, F. H. Dolan, the sum of $32,500.00 [R. 33];

(c) For appellant, Ben Baxter, the sum of $1,750.00 [R. 33];

(d) For appellant, S. James Tuffree, the sum of $3,500.00 [R. 33];

(e) For appellant, Ed Kelly, the sum of $9,000.00 [R. 33];

(f) For appellant, F. A. Yungbluth, the sum of $1,750.00 [R. 33];

(g) For appellant, Minnie Palmer, formerly known as Minnie Baxter, the sum of $3,850.00 [R. 33];

(h) For appellant, M. Del Giorgio, the sum of $875.00 [R. 34];

(i) For appellant, Jennie Pomeroy, the sum of $3,500.00 [R. 34];

(j) For appellant, J. W. Truxaw, the sum of $1,750.00 [R. 34];

(k) For appellant, J. J. Dwyer, the sum of $1,750.00 [R. 34];

(l) For plaintiff, M. E. Day, the sum of $875.00 [R. 34];

(m) For plaintiff Ernest F. Ganahl, the sum of $1,750.00 [R. 34];

(n) For plaintiffs, Frank Baum and Josephine Baum, the sum of $5,250.00 [R. 34];

(o) For interest on each and all of the aforesaid amounts at the rate of 7% per annum from January 15, 1934; and for the redelivery and cancellation of all notes and trust deed received from the plaintiffs alleged to have been given to the bank and that the lien created by any such instruments on any of the property enumerated [R. 22-24] be cancelled and that the bank cause a satisfaction of any liens theretofore given by plaintiffs upon the matter therein litigated to be recorded [R. 34] and for plaintiffs' costs of suit and for such other relief as to the Court might seem meet and proper [R. 34].

The answer of defendant, Anaheim First National Bank, a national banking corporation, by and through J. V. Hogan, Receiver of said Anaheim First National Bank, a

national banking corporation, was filed [R. 50]. The answer admits that the depreciation in the bond account pled in the complaint existed on or about June 18, 1936; admits that the claims made in the complaint were duly presented to the Receiver according to law and admits that the claims were not paid. The only issue taken is a denial that the plaintiffs and appellants entered into a lawful agreement with the bank whereby they, and each of them, agreed to purchase from said bank the depreciation then existing in said bond account. Thereafter, dismissal of Frank Baum and Josephine Baum was filed on June 5, 1937 [R. 77] and order *re* withdrawal of Frank Baum and Josephine Baum as parties plaintiff was entered and recorded June 5, 1937 [R. 76]. On August 13, 1938, a stipulation was filed as to a severance of Ernest F. Ganahl from said action and that his appeal might be dismissed as to him only [R. 159] and order granting severance of Ernest F. Ganahl to appeal was signed by William P. James, United States District Judge, and entered on August 13, 1938 [R. 160]. Since a time prior to the commencement of this action, the plaintiff F. K. Day has been dead [R. 84] and M. E. Day succeeded to all his right, title and interest herein sued upon, and the said plaintiff, M. E. Day, is now the owner and holder thereof [R. 4-5]. Thereafter, the cause proceeded to trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable William P. James, judge presiding, sitting without a jury, a jury trial having been duly waived by the respective parties to said action, on July 20 and 21, 1937 [R. 92]. Findings of fact and conclusions of law were signed by the said William P. James, judge of said District Court on February 28, 1938, filed March 2, 1938 [R. 91], and judgment in favor of the appellee and against the appellants was

entered and recorded March 2, 1938 [R. 93]. Motion for new trial was duly noticed for hearing on the 25th day of April, 1938 [R. 99-100] and the Court on May 13, 1938, caused his minute order to be entered denying plaintiffs' motion for new trial [R. 101]. This appeal is prosecuted from the judgment of the District Court of the United States under the authority of U. S. C., Title 28, section 225, sub-section (a) (Judicial Code—Amended). Pursuant to that certain Order of this Honorable Court made on the 20th day of April, 1939, and pursuant to a hearing in this Honorable Court on May 10, 1939, on the question of the applicability of the new rules of civil procedure for the District Court of the United States to the above cause, it was ordered by this Honorable Court on the 10th day of May, 1939, that the appellants should within fifteen days from that date serve and file with the clerk of the trial court, a designation of the necessary parts of the record and exhibits they desired to supplement the Transcript of Record on file in this Court in the above cause, and that the appellee within five days thereafter serve and file a designation of such additional parts with the clerk of the trial court and that the clerk of the trial court should thereafter certify such documents as a Supplemental Transcript of Record to this Court and that within five days after the filing of said Supplemental Transcript of Record and Exhibits the parties might file a designation of the parts of such record and exhibits deemed necessary for the hearing of this cause in this Court. Pursuant to said Order the appellants herein did, on the 1st day of June, 1939, file designation for Supplemental Transcript of Record designating all of the Reporter's Transcript of Testimony and Proceedings on Trial together with the Reporter's Transcript of copies of Plaintiffs' Exhibits 1, 2, 3, 4 and Defendant's Exhibits

A, B, C, D, E, F, G, H, I, J and K (all inclusive) [S. R. 199] and the appellee did consent to the printing of the whole of Reporter's Transcript of Testimony and Proceedings on Trial and of Plaintiffs' and Defendant's Exhibits to be used as Supplemental Transcript of Record on June 1st, 1939, which said consent was duly filed in this Honorable Court on June 2nd, 1939 [S. R. 200]. The above cause, although filed before September 1st, 1938 (the effective date upon which the new rules of civil procedure became effective) was still pending on and after that date, and therefore, the New Federal Rules of Civil Procedure are applicable to the above cause. (Rule 86, Federal Rules of Civil Procedure.)

STATEMENT.

On or about the 18th day of June, 1931, the bank was a national banking association organized and existing under the statutes of the United States known as the National Banking Act, which at all times had its place of business at Anaheim, Orange County, State of California [R. 5]. That on or about the 18th day of June, 1931, the regular monthly meeting of the Board of Directors of the bank was held and it was then moved by Ben Baxter (one of the appellants herein), seconded by F. H. Dolan (another one of the appellants herein) and carried that a committee be selected to collect $175.00 per share from stockholders to be used to purchase depreciation in bond account [S. R. 16-17]. On or about the 17th day of July, 1931, the regular meeting of the Board of Directors of the bank was held [S. R. 19-20] and it was resolved that $115,650, which had been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, together with certain other proceeds held on the books of the bank on reserve account, be applied to take up five notes of

$6,000.00 each, as formerly placed in the bank's assets by certain stockholders on account of bond depreciation; the balance of the said amount was to be applied directly against the bond account of the bank on account of estimated depreciation reducing the then total of bond account by $110,650. It was further resolved that as further payments were received from stockholders on account of the purchase of bond depreciation, that such sums should be applied on the bond account as above specified [S. R. 20].

The intended purpose of the purchase of the bond account was embodied in Plaintiffs' Exhibit 4, which reads in part as follows:

> "It is the intention that interest received from bonds equalling the amount of depreciation purchased be set aside for the use of the undersigned. An appraisal of the bond lease shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided *pro rata* among the stockholders purchasing depreciation of bond account." [S. R. 80-81-82.]

In compliance with the action of the Board of Directors taken at the meeting on June 18, 1931 [S. R. 80-81-82] recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned [S. R. 80], the shareholders subscribed to such fund in the amount set opposite their names [S. R. 81-82] with the intention that interest received from the bonds equalling the amount of depreciation purchased to be set aside for the use of the subscribers named. An appraisal of the bond account was to be made every six months and should any decrease in the depreciation be shown, the amount of such appreciation to be divided *pro*

rata among the stockholders purchasing the said depreciation [S. R. 81]. The various amounts subscribed by the shareholders were in fact paid in, and no part thereof has ever been repaid to any of the appellants herein [R. 6, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, 32]. The sum of $30,000.00 of the money so subscribed was used for the purpose of cancelling the bank's indebtedness to certain directors and stockholders who had under like circumstances subscribed that amount in the year 1930 for the purpose of taking up the depreciation in the bond account at that time [S. R. 20]. The method of making a loan to the bank for the purpose of taking up bond depreciation by purchase thereof was used by the directors at the instigation of R. Foster Lamm, a bank examiner duly appointed by the Comptroller of the Currency [S. R. 94 and 95]. When the said R. Foster Lamm notified the directors of the Bank that the bond account of said Bank was deficient, the directors inquired of him as to what could be done about the matter and he suggested that they follow the same procedure which he had formerly caused the First National Bank of Huntington Beach, California to follow in 1929, namely, that the directors purchase the said depreciation in bond account which had become a bad asset, thus giving them a possibility of return of the money which they put in the surplus account or undivided profit account [S. R. 95]. The question was raised at that time as to whether or not there would be any chance of the directors getting their money back if they contributed to the bank. The said R. Foster Lamm, bank examiner, advised them that if they contributed to the bank under his suggestion that what they would do actually would be to buy the depreciation of the bond account which he had found to be a bad asset [S. R. 94].

In the trial of this case in the District Court of the United States, the said bank examiner, under cross-examination, testified that that was one of the customary methods of repairing impaired capital for anyone interested in the bank, such as stockholders or directors or officers, and that such a method had been used in other banks prior to the occasion when it was suggested for the repair of the capital of this bank [S. R. 99]. When asked whether he had ever had the approval of the Department as to such a plan, he replied that the Department had never disapproved it, nor had he received any comment from the Comptroller's office indicating disapproval, although he had submitted the plan to the Department as an accomplished fact in 1929 [S. R. 100]. In a letter from E. H. Gough, Deputy Comptroller of the Currency, addressed to the Board of Directors, Anaheim First National Bank, Anaheim, California, on July 2, 1930, the directors were informed that restoration of the capital might be provided for *by the purchase for cash of the assets estimated by the examiner as losses* [S. R. 89]. The president of Anaheim First National Bank replied to that letter under date of July 17, 1930, and informed the Comptroller that the subscribing directors and stockholders had *purchased the depreciation in the bond account* [S. R. 91]. The Comptroller never disapproved of this form of repairing the capital. The first notice received by the directors and stockholders of the bank that the Comptroller's office viewed their subscriptions as a purchase with distaste, and felt that the money already paid in should be a voluntary contribution was subsequent, to-wit, August 20, 1931, some time after they had paid in the amounts subscribed by them under what they considered to be a valid agreement to purchase the bond account repayable as hereinabove set forth [S. R. 80-81 and 82].

When R. Foster Lamm, the bank examiner for the bank, was replaced by W. J. Waldron, national bank examiner [S. R. 176] the said W. J. Waldron, also approved the said plan [S. R. 77 and 180].

The appellants Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth were stockholders but not directors of said bank and they at no time attended any of the meetings of said bank [S. R. 121, 126, 121].

On January 15, 1934, the bank was declared insolvent by the Comptroller of the Currency of the United States, and on said date the said Comptroller appointed J. V. Hogan as Receiver of the bank, and ever since said date the receiver has been, and now is, the duly appointed, qualified and acting receiver of the bank [S. R. 146-7] and as such took possession of all the assets of the bank including said bond account, and has ever since been liquidating the same [S. R. 147] without regard for appellant's rights.

After the appointment of the receiver, and on or about the 23rd day of August, 1934, the appellants presented to the receiver their respective claims for the respective sums of money subscribed and paid by them to the bank, plus interest thereon, and on August 23, 1934, M. E. Day presented her claim for the sum of $875.00 paid to the bank by F. K. Day, with interest thereon, all in the manner and form required by the Comptroller of the Currency, but none of said claims, nor any part thereof has been paid [R. 88].

Many of the bonds involved in the bond account of said bank, the depreciation of which was purchased by the stockholders, were sold and an appreciation shown in their value [S. R. 189, 190].

To summarize the facts, it appears that the directors and stockholders of the bank, upon the advice and at the suggestion of the bank's duly qualified and appointed examiner, subscribed certain moneys of their own to the bank with the intent of purchasing a depreciation in the bond account so that the bank might benefit thereby and by so doing paid a subscription at the rate of $175.00 per share, with the intent and purpose that such money was to be repaid to them from the appreciation in the bond account so purchased; that after such subscription had been paid into the bank they were notified by the Comptroller of the Currency that such an agreement should not be made; that certain of the subscribers were not directors, but were merely stockholders; that the bank later went into the hands of a receiver; that the receiver took over said bond account together with bank assets; that the receiver subsequent thereto sold certain of the bonds which showed an appreciation in value; that the receiver has never repaid, nor have any of the subscribers, or any of them, at any time received, any part of the moneys subscribed by them; that no accounting has at any time been made to the subscribers by the receiver for any of the money obtained from the sale of bonds from said bond account, nor of the bonds now remaining in his hands.

Some of the findings of fact in the above cause are contradictory and contain, in the opinion of the appellants, negative pregnants. This is so in matters material to this cause. Findings V and X are respectively as follows:

"V.

That it is not true that in any such agreement, as set forth in said complaint or otherwise, the following persons respectively agreed to pay to said Bank the following, or any other, sums:

L. J. Kelly	$ 4,900.00
F. H. Dolan	32,500.00
Ben Baxter	1,750.00
S. James Tuffree	3,500.00
Ed. Kelly	9,000.00
F. A. Yungbluth	1,700.00
Minnie Palmer (formerly known as Minnie Baxter)	3,850.00
M. Del Giorgio	875.00
Jennie Pomeroy	3,500.00
J. W. Truxaw	1,750.00
J. J. Dwyer	1,750.00
F. K. Day	875.00
Ernest F. Ganahl	1,750.00 and
Frank Baum	5,250.00;

and *it is not true that pursuant to any such agreement said persons, excepting Ernest F. Ganahl and Frank Baum, on or about July 17, 1931, paid to said Bank the sums hereinabove set opposite their respective names and it is not true that pursuant to any such agreement said Ernest F. Ganahl on or about July 17, 1931, executed his promissory note for $1,750.00 to said Bank or that, pursuant to such agreement he made any payments of principal or interest on such a note; and it is not true that pursuant to any such agreement said Frank Baum executed his promissory note dated December 19, 1932, for $5,250.00 to said Bank or that pursuant to such agreement he paid interest on said note, or that, pursuant to such agreement, plaintiffs Frank Baum and Josephine Baum on or about May 9, 1933, executed and delivered to said Bank a certain trust deed on the property described in the fourteenth count of the complaint on file herein;* that it is true that on or about July 17, 1931, the

above named persons, except Ernest F. Ganahl and Frank Baum paid to said Bank the sums of money hereinabove set opposite their respective names, and it is further true that on or about July 7, 1931, said Ernest F. Ganahl executed to said Bank his promissory note for $1,750.00, and it is further true that said Frank Baum executed to said Bank his promissory note dated December 19, 1932, for $5,250.00, and it is also true that subsequently said Frank Baum and Josephine Baum executed and delivered to said Bank a trust deed covering certain property described in the fourteenth count of said complaint, but said payments were made and said notes and trust deed were executed and delivered by said persons as voluntary contributions to said Bank and said Bank was not and is not obligated under any such agreement or otherwise to repay said sums or any part thereof, and said Bank has not repaid the same or any part thereof.

X.

That it is not true that within two years prior to the preparation of the complaint on file herein, or within two years prior to the filing thereof, the persons hereinabove in Finding No. V named loaned respectively to said Bank the sums respectively set after their names in said Finding No. V; and it is not true that said Bank received said respective sums, or any of said sums or any part thereof, for the use and benefit, or use or benefit, respectively of said persons, or any of said persons, whose names are set forth in said Finding No. V; *and it is not true that said Bank promised to repay said sums on demand or otherwise;* and it is true that while said sums have not been repaid to any of said respective persons, although demand has been made therefor, it is also true that said Bank is in no way obligated,

in the matter of said receivership or otherwise, to repay said sums or any part thereof to said persons or to any persons or person whomsoever."

Each of the above findings is, in the nature of a negative pregnant as to the ultimate facts material to the action. For the convenience of this Honorable Court, appellants have placed that which they conceive to be negative pregnants in italics. It is apparent from a reading of these findings that they do not negative the allegations of the plaintiffs' complaint to which they refer, but imply the truth of at least some of the allegations without showing which ones, if any, are untrue, thus impliedly admitting the truth of the allegations.

Summary of Argument and Points of Law.

The resolution passed at the meeting of the Board of Directors on the 29th day of May, 1930 [S. R. 105] recites that a reserve fund be created by subscription of various stockholders to offset the depreciation in the bond account, and that the stockholders so subscribing would be reimbursed from said reserve fund to be built up by appreciation in the bond account or by any other earnings of the bank, thus showing their intent to enter into an agreement with the bank to purchase the depreciation in the bond account, *or to purchase for cash those assets of the bank which the bank examiner condemned as losses.* A copy of this resolution was attached to the letter of the president of the Anaheim First National Bank to the Comptroller of the Currency under date of June 11th, 1930 [S. R. 88]. In his reply to that letter, E. H. Gough, Deputy Comptroller of the Currency under date of July 2nd, 1930, acknowledged receipt of the said resolution [S. R. 88] and definitely informed the

Board of Directors of Anaheim First National Bank that restoration of capital could be restored under Section 5205 by the *purchase for cash of the assets estimated by the examiner as losses* [S. R. 89]. On July 17, 1930, the president of Anaheim First National Bank addressed a letter of reply to Mr. E. H. Gough's letter of July 2nd, 1930 and informed him that the subscribing stockholders had subscribed the sum of $30,000 which amount was placed in a reserve account with the bank for the purpose of covering a partial depreciation in the bond account of said bank *with the understanding that they had purchased the depreciation in the bond account.* To that letter the Comptroller made no reply, thus, at least tacitly, approving the restoration of the impaired capital of the bank by that plan. This creates a conclusive presumption as against the appellee that such a method of repairing impaired capital losses was valid and satisfactory to the Department.

Yazoo State Bank v. Kimbrough, 127 S. 265, 157 Pac. 149.

2. The letter from the Comptroller of the Currency addressed to the directors of the bank subsequent to the time when said subscriptions were made at the instance and suggestion of the National Bank Examiner, R. Foster Lamm [S. R. 41-42] is not binding upon the appellants because it was written, and received, subsequent to the transaction in question, and in the case of the contributing stockholders who were not directors, was not seen by them, nor were they apprized of its contents, and did not by its terms forbid such an agreement but merely stated that such action *should* not be taken [S. R. 42].

The same is true as to the cross-examination by counsel for the bank as to matters and events which had tran-

spired a year prior to the transaction involved in this particular case [S. R. 83-84].

3. The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders or creditors, and in the instant case the receiver's failure to account to the subscribing appellants for the appreciation in the value of the bonds purchased by them, and the disposition of the remaining bonds by the receiver in the instant case, was and is unlawful.

Way v. Camden Savings Deposit and Trust Co., 21 Fed. Supp. 700;

Brown v. Schleier, 112 Fed. 577, aff'd 118 Fed. 981, 55 C. C. A. 475, which is aff'd 24 S. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

4. By reason of the appointment of the receiver and liquidation of the bond account purchased by the directors and stockholders prior to said appointment, there was a failure of consideration for the amounts of money subscribed respectively by the appellants to said bank.

Code 1930, Secs. 22-1802;

Skinner etc. v. Rich et al., 55 Pac. (2d) 1146.

5. The respective claims of the appellants presented to the receiver were valid and subsisting claims against the bank.

Eisele v. First National Bank, 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal 1928), 142 Atl. 29, 102 N. J. Equity 598.

6. If the method used to restore the impaired capital of the bank was unlawful under Section 5205, or any other statute pertaining to national banks then, the agreement being unlawful was void in its inception, and each and all of the subscribing stockholders have the right under the law to a refund of each and every amount paid into the bank for restoration of the impaired capital.

Wood v. Imperial Irr. Dist., 216 Cal. 748;

Silverthorn v. Percy, 120 Cal. App. 83;

Butterfield Constr. Co. v. Federal etc., 5 Cal. App. (2d) 16;

Teachout v. Bogey, 175 Cal. 481;

Moffatt v. Boulson, 96 Cal. 106.

7. Findings of Fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation.

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at page 540;

Auerbach v. Healy, 174 Cal. 60-65, 161 Pac. 1157;

South. Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

ARGUMENT.

Preliminary Observations.

The pleadings, shorn of all by-play and irrelevant verbiage in the answer of the appellee, admits all of the allegations of the complaint and raises but one issue [R. 50-74]. Appellants base their respective claims against the bank upon the agreement with the bank as embodied in Plaintiffs' Exhibits I and IV [S. R. 16, 17, 80, 81 and 82]. The appellee by its answer admits the payment of the respective amounts by the respective appellants, and the fact that those amounts were never repaid in any manner or at all to the appellants, or any of them, but denies the validity of the agreement of the bank with the appellants [R. 50-74]. The appellee bases its whole case on the letter written by the Comptroller of the Currency to the Board of Directors of the bank subsequent to the transaction which constitutes the cause of action here [S. R. 41 and 42], and other letters to like effect that contributions as made in this case to restore capital *should* be made unconditionally and without the expectation of reimbursement, and a letter from the Comptroller of the Currency under date of July 2, 1930, in regard to an entirely different transaction which had no bearing upon the issues in this case. No attack is made on the agreement of June 18, 1931 [S. R. 16] except the validity thereof, based upon the letters of the Comptroller of the Currency already referred to. The evidence, without contradiction or conflict, shows the contributions of the moneys by the appellants [S. R. 80], the intent to make such subscriptions with the intent of being reimbursed, [S. R. 80], to be repaid in pro rata shares should a decrease in the depreciation be shown [S. R. 80]. The evidence further shows without contradiction that Minnie Palmer, formerly known as Minnie Baxter,

M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, appellants, were stockholders and not directors of the bank and that they at no time attended any of the meetings of the bank [S. R. 126-121-122-124-125].

In connection with the letter from the Comptroller of the Currency of August 20, 1931 [S. R. 41-42], it is to be noted that no place in that letter does the Comptroller state definitely that such contributions *cannot* be made as loans to the bank, but instead he uses this language. We quote:

> "* * * this office wishes to bring to your attention again at this time the fact the contributions made to restore capital *should* be made unconditionally and without the expectation of reimbursement. * * *" (Italics ours.)

It is further to be noted that the Comptroller of the Currency had advised the president of the bank on July 2, 1930, in regard to an entirely different transaction, but one involving exactly the same circumstances, that *bad assets viewed as losses by the examiner could be purchased by stockholders for cash* [S. R. 82-90] *and he at no time voiced disapproval of the refund to the contributing stockholders in that transaction of the sum of $30,000.* It was not until the bank was declared insolvent and the receiver appointed in 1934, three years later, that the directors and stockholders received their first definite notice that the Comptroller of the Currency would not recognize their agreement with the bank as valid. Certain it is that no fact or circumstance as presented in this action even remotely raises an issue with respect to the existence of the agreement. The only issue taken is as to the validity and enforcement of the agreement.

It is further to be noted, as was brought out by counsel for the appellee in the trial of this matter, that *if the impairment of the bank capital had not been met in a manner satisfactory to the Comptroller of the Currency, that the Comptroller could have closed the bank and put a receiver in charge to liquidate the same* [S. R. 115]. *In fact, that was the Comptroller's duty. This, however, was not done until nearly four years later when Mr. Hogan was appointed as receiver* [S. R. 147].

I.

The Directors or Stockholders of a Bank Can Make a Valid Contract With It in Absence of Fraud, Bad Faith or Undue Advantage.

The subscriptions to the bank on the part of the appellants were not voluntary contributions. They were made to purchase the depreciation in the bond account at the instance and request of the bank examiner, R. Foster Lamm, who was a duly appointed and qualified representative of the Comptroller of the Currency [S. R. 94-95]. Indeed, they were made after the said R. Foster Lamm had informed the directors of the bank, who had questioned the said R. Foster Lamm as to that method that that same procedure had been followed by the First National Bank of Huntington Beach, California, in 1929 [S. R. 99]. The subscriptions were made solely for the benefit of the bank, and pursuant to the instructions and information given to them direct from the Department in the letter from E. H. Gough, Deputy Comptroller of the Currency, under date of July 2nd, 1930, that they might purchase for cash assets estimated by the examiner as losses. This is exactly what they did. The consideration for the subscriptions made was the depreciation in

the bond account. In other words, they purchased for cash the depreciation in the bond account which the bank examiner had condemned as bad assets.

There was no fraud, no bad faith, or undue advantage practised by the directors in causing such subscriptions to be made to the bank. There could be no wrong on the part of the directors and stockholders in purchasing the depreciation in said bond account.

In the case of *Everett v. Staton,* 134 S. E. 492, 192 N. C. 216, the Court used the following language:

> "Directors of bank can make valid contract with it, in absence of fraud, bad faith or undue advantage."

In the case of *Andrews v. Citizens State Bank of Goldfield,* 221 N. W. 954, 207 Iowa 386, the Court found as follows:

> "Officers of insolvent bank, who made loan to bank, may be termed depositors to extent which loan consisted of deposits."

Again, in the case of *Eisele v. First National Bank,* 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal, 1928) 142 Atl. 29, 102 N. J. Equity 598, it was held as follows:

> "Directors advancing money to bank to meet deficit caused by depositor's overdraft may recover such money on settlement."

It has been held in the State of California that such agreements were valid agreements and that contributions so made are not voluntary contributions. It was so found in the case of *Dudley v. Citizens State Bank of Santa Monica,* 103 Cal. App. 433.

To the same effect is an early district of Ohio case, *Booth v. Welles,* 42 Fed. (2d) 11. In this case the particular portion which we refer to is on page 14.

Along this same line we cite the case of *In re Hulitt,* 96 Fed. 785, wherein we find the following:

> "Where the number of shareholders of a national bank in good faith paid an assessment made to comply with the requirements of the Comptroller to make good an impairment of the bank's capital, although such an assessment was invalid, because made by the directors instead of by the stockholders, on the insolvency of the bank, and after the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amount so paid, before general distribution of remaining assets among all the shareholders."

In the case of *Wyman v. Bowman,* 127 Fed. 257, the Court said:

> "Contracts between directors of a corporation and the corporation, which are fair and made in good faith which do not secure an unjust benefit, and in which the interest of the individuals and the duty of the officers *work together for the welfare of the corporation are valid.*" (Italics ours.)

To the same effect are the following cases:

Rhea v. Newton, 262 Fed. 345, certiorari denied (1920);

Newton v. Rhea, 41 S. C. 14, 254 U. S. 643, 65 L. Ed. 454;

McLean v. Bradley, 299 Fed. 379, affirming judgment (D. C., 1932) 282 Fed. 1011, certiorari denied S. C. 98, 266 U. S. 619, 69 L. Ed. 471;

In re Lake Chelan Land Company, 257 Fed. 497, 5 A. L. R. 577.

In the case of *Yazoo State Bank v. Kimbrough,* 127 So. 149, the Court said:

> "Cashiers and directors putting up cash in place of notes, examiner rejected, held entitled to proceeds of notes when collected."

The language just quoted is an exact statement of what appellants contend the law to be. In the instant case we have a bond depreciation which was purchased by the directors and other stockholders for the benefit of the bank, under an agreement that an appraisal be made of such bond account every six months and that any appreciation shown in said bond account would be distributed among the contributing directors and shareholders in pro rata shares. In other words, the directors and shareholders purchased the depreciation in the bond account which the bank examiner rejected and any appreciation in that bond account should have been distributed to the appellants, who purchased the same.

II.

Letter From the Comptroller of the Currency Addressed to the Directors of the Bank Subsequent to the Time When Said Contributions Were Made at the Instance and Suggestion of the Bank Examiner, R. Foster Lamm, Is Not Binding Upon the Appellants Because it Was Written and Received Subsequent to the Transaction in Question, and in the Case of the Contributing Stockholders Who Were Not Directors Was Not Seen by Them Nor Were They Apprized of Its Contents. The Same Is True of Any Letters Addressed to the President of the Bank Prior to the Date of This Transaction Referring to a Totally Different Transaction.

The subscriptions to the bank were made in compliance with the meeting of June 18, 1931 [S. R. 16-17], and in a letter dated August 20th, two months afterwards, the Comptroller of the Currency notified the board of directors of the bank, in part, as follows:

> "A capital impairment of $94,400.53 was shown by national bank examiner W. J. Waldron in this report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash and $41,875 in the form of fourteen ninety-day notes. There were still eighteen stockholders to interview and obtain contributions from."

Then the fourth paragraph of the same letter:

> "Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital *should* be made unconditionally and without the expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard." [R. 112-113.] (Italics ours.)

No place in that letter did the Comptroller of the Currency say that such contributions *must* be considered as voluntary, but merely that they *should* be. As will be readily noticed, this letter was written subsequent to the date of the transaction in question, and therefore could not be binding upon the parties.

The only time prior to the transaction with which we are dealing here when the Comptroller of the Currency made any comment as to the handling of such situations was prior to the time when his bank examiner, R. Foster Lamm, advised the procedure adopted in this case, to-wit, in an entirely different transaction, which took place on the 29th day of May, 1930, one year prior to this transaction. The same law therefore applies. It is also to be noticed that at no time has the repayment of that former loan been criticized.

III.

The Evidence in the Trial of the Case Showed That There Had Been an Appreciation in the Value of Bonds Taken Over by the Receiver of the Bank, and the Receiver of a National Bank Succeeds to No Rights Beyond Those Which Could Have Been Enforced by the Bank, Its Stockholders or Creditors.

The written instrument "Disposition of Bonds" [S. R. 127-128, 189-190] shows on its face an appreciation in the bond account of $655.62, obtained by the receiver for the bonds which were sold. These bonds were among those listed in the depreciation which the appellants purchased. Since the best evidence is the written instrument, we can see no reason to argue this point.

The receiver's failure to account to the subscribing appellants for the appreciation in the value of the bonds purchased by them, and the disposition of the remaining bonds (the appreciation in which was proven) was and is unlawful.

Way v. Camden Savings Deposit and Trust Co., 21 Fed. Sup. 700;

Brown v. Schleier, 112 Fed. 577, affirmed 118 Fed. 981, 55 C. C. A. 475, which is affirmed 24 S. C. 558, 194 U. S. 18, 48 L. Ed. 857.

IV.

By Reason of the Liquidation of the Bond Account, the Depreciation in Which Was Purchased by the Appellants, There Is a Failure of Consideration for the Respective Amounts Subscribed by the Respective Appellants.

After the appointment of the receiver of the appellee bank and the liquidation of the bond account, the appellants were deprived of their only possible chance to recover the amount of their respective subscriptions under the agreement entered into in compliance with the action of the board of directors taken at a meeting held June 18, 1931, as set forth in Plaintiffs' Exhibit No. 4 [S. R. 80, 81 and 82].

Code 1930, Sec. 22-1802.

Skinner etc. v. Rich et al., 55 Pac. (2d) 1146.

There is no way at this late date, in fact there is no way at all, of telling whether or not the bonds were liquidated at the best price which the market would bring, but we do know that by their liquidation the appellants were deprived of the sole consideration for which they paid their money.

V.

The Respective Claims of the Appellants Presented to the Receiver Were Valid and Subsisting Claims Against the Bank.

The agreement entered into between the bank and the appellants in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed, three years later. There is no contention but that the respective claims of the appellants herein were duly presented to the receiver in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24]. That there can be such a valid and subsisting claim as the one in this point need scarcely be argued, but we do quote the following case on this point:

> *Eisele v. First National Bank,* 137 Atl. 827, 101 N. J. Equity 61, affirmed (Err. & App., 1928) 142 Atl. 29, 102 N. J. Equity 598.

VI.

If the Agreement Entered Into Between the Appellants and the Bank in Compliance With the Meeting of June 18, 1931, Was in Fact Unlawful, Then It Was Void in Its Inception and the Subscribing Stockholders Have the Right Under the Law to a Refund of the Respective Amounts, Paid by Them Under That Contract.

Under no theory could the appellee retain the amount of the subscriptions of the appellants herein under an unlawful contract made in contravention of statute. If, as the appellee contends, such a contract was forbidden by the National Banking Laws and was in fact *ultra vires,* then there was no mutuality of consent, no consideration and the contract was void from the beginning.

McKinney's Digest, "Contracts," Sec. 14;
6 *Cal. Jur.* 44;
6 *R. C. L.* 686;
26 *A. L. R.* 473 (Notes).

The contract not being *malum in se* but merely *malum prohibitum,* and entered into through mistake in law and fact, gives the appellants the right to refund of the respective moneys subscribed by them.

McKinney's Digest, "Contracts," Sec. 32;
4 *Cal. Jur.* 784;
6 *Cal. Jur.* 78;
6 *R. C. L.* 620;
6 *R. C. L.* 629.

VII.

Findings of Fact Which Are Contradictory and in the Nature of Negative Pregnants in Form as to Ultimate Facts Material to the Cause of Action Imply the Truth of the Allegation, and Since One Part of the Contradictory Findings Would Support the Judgment and Another Part Would Upset It, Then the Judgment Cannot Stand.

Findings of Fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation.

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at page 540;

Auerbach v. Healy, 174 Cal. 60-65, 161 Pac. 1157;

Southern Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

VIII.

The Equities in This Proceeding Are With the Appellants.

Without repeating what we have said in the foregoing argument, we respectfully submit to the Court that the facts and circumstances show that it was the desire and intent and purpose of the appellants to aid the bank which was in distress due to an impairment of capital caused by depreciation in the bond account, *but* that the appellants subscribed to the fund for the purchase of said depreciation only as a loan to the bank, such moneys to be repayable to them by the bank, if and when the said bond account appreciated in value. This they did under what they considered to be a valid agreement with the bank, signed by the proper officers on behalf of the bank. They had the word of the bank examiner, who had been appointed by the Comptroller of the Currency, that this could and had been done on a prior occasion, as well as the word of the Department itself as contained in the letter of July 2, 1930 [S. R. 89]. They were further justified in their belief by reason of the fact that part of the money which they were subscribing in this transaction was to be used for the repayment of a prior subscription made under identically the same circumstances [S. R. 20], which was later done, and never disapproved by the Comptroller.

It was not until subsequent to the time when they had already put up their money that the directors were notified by the Comptroller that this method *should* not be

used. Even then they were not definitely advised that such a method *must* not be used [S. R. 42]. Further, they were at no time advised by the Comptroller's office that the repayment of the amounts refunded to the stockholders and directors who subscribed on the prior occasion, was unlawful.

In the cases of the appellants, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, they were stockholders and not directors of the said bank, and at no time attended any of the meetings of said bank. They were never advised, nor in any way apprised, of the fact that the Comptroller's office at any time, or at all, whether prior or subsequent to the transaction in question, objected to their subscriptions being made in the form of a loan.

The agreement between the bank and the appellants was recognized as a valid agreement from the 18th day of June, 1931, until the bank was declared insolvent and the receiver appointed three years later. The latter took over the bonds in said bond account and refused to acknowledge the respective claims of the appellants herein, which were duly presented to him all in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24], more than three years after the contributions were made.

It is the position of the appellee that, because some of the appellants were notified subsequent to the transaction that the transaction *should* not have been made, that no

equities arise in behalf of the appellants. Every principal of equity decries such a position.

Arguing this case as a case in equity, rather than a case at law, an agreement was entered into between the bank and its directors and certain stockholders thereof. The appellee contends that this agreement was unlawful. If it was unlawful then it was void from its inception.

Civil Code of California, Secs. 1667, 709-16;
6 *R. C. L.* 692-694-696;
58 *A. L. R.* 804.

But this was not a contract *malum in se,* but merely *malum prohibitum,* entered into through mistake in law and fact.

McKinney's Digest, "Contracts," Sec. 32;
4 *Cal. Jur.* 784;
6 *Cal. Jur.* 78;
6 *R. C. L.* 620;
6 *R. C. L.* 629.

Under no theory could it become a contract as viewed by the appellee since, if the appellee is correct in its view at this time, then there was no mutuality of consent.

McKinney's Digest, "Contracts," Sec. 14;
6 *Cal. Jur.* 44;
6 *R. C. L.* 686;
26 *A. L. R.* 473 (Notes).

As soon as their mistake was discovered by the appellants they brought action. They did not sleep on their

rights. The position of the appellee is untenable. Equity has never permitted advantage to be taken of a mistake whether in law or in fact, nor has equity ever permitted unjust enrichment of one party to a contract at the expense of the other.

We have presented what we conceive to be the only issues involved in this action. Nothing in the record, or the supplemental record, discloses any other issue. The fact that the Comptroller of the Currency notified the president of the bank (who is not an appellant) that a prior transaction was not in accordance with his views has naught to do with the transaction in controversy, nor does such a fact open the door to surmise and conjecture. Nor does anything which has transpired since the date of the transaction change the rights of the respective appellants.

We believe that we have demonstrated that the agreement entered into between the appellants and the bank was a valid agreement and that the appellants did in fact purchase the depreciation in the bond account; that the receiver stood merely in the shoes of the bank and succeeded to no greater rights than had the bank. Hence, the appellants were entitled to an accounting from the receiver as to the proceeds of the bond account and are entitled to the proceeds now in the hands of the receiver from the disposition of said bond account.

In no event can the judgment of the District Court stand since negative pregnants in Findings of Fact V and X are contradictory and where one part of such find-

ing would support the judgment and another part would necessarily upset it, the judgment is not valid.

Should this Honorable Court find this case one in equity rather than a case at law, then the appellants are entitled to a refund of the respective amounts contributed by them under the agreement which the appellee now contends was unlawful since said agreement would then be void in its inception, and not being *malum in se* but merely *malum prohibitum,* the appellants are entitled to a refund of their money.

We respectfully ask that the decree of the District Court be reversed.

Respectfully submitted,

EDW. C. PURPUS,

Attorney for Appellants.

No. 9020.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a National Banking Association,

Appellee.

APPELLEE'S FURTHER BRIEF.

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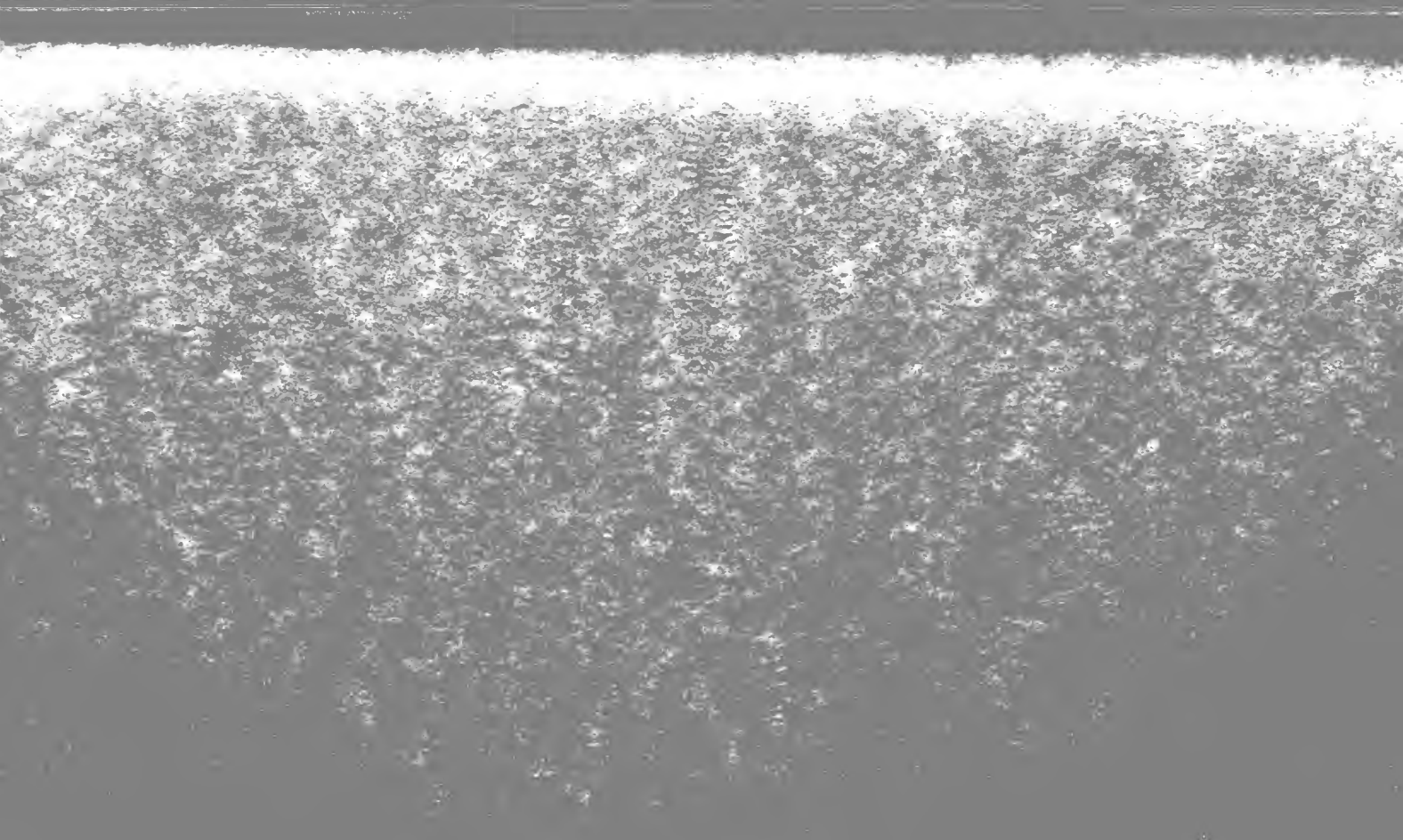

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Appellee.

APPELLEE'S FURTHER BRIEF.

Introductory.

This, Appellee's Further Brief, is an answer to Appellants' Opening Brief, which was filed on or about July 7, 1939, pursuant to a court order made by the above-entitled court under date of May 10, 1939.

It will be remembered that briefs had already been filed in this appeal by the respective parties. The court,

however, in view of appellants' defective record, authorized, by its said order, the preparation and filing of a Supplemental Transcript of Record (hereinafter referred to as Supp. Tr.) and granted the parties an opportunity to present further briefs.

A comparison of appellants' later opening brief, filed on or about July 7, 1939, with appellants' earlier opening brief, filed on about November 30, 1938, discloses that most of it is a reprint of, or is a substantial restatement of, what already appears in their earlier brief. Such additional matters as appear therein will receive special attention hereafter. There would appear to be no necessity or good reason for appellee to reprint, or substantially restate, what has already been set forth in its earlier brief in answer to appellant's arguments and, accordingly, we shall hereinafter, in answering the points contained in appellants' later brief, confine ourselves, for the most part, to the appropriate pages of our earlier brief, adding, where advisable or necessary, new discussion or comment.

Error in Title of Cause on Appeal.

We note that the cover and introductory page of the Supplemental Transcript of Record later filed contain the same error in entitling the cause on appeal as appears on the cover and introductory page of the Transcript of Record originally filed herein. This error should be corrected in the manner indicated on page 2 of appellee's earlier brief.

Regarding Appellants' Jurisdictional Statement.

Appellants' jurisdictional statement, as contained in their later brief (pp. 2 to 6) is a reprint of the jurisdictional statement appearing in their opening brief (pp. 2 to 5), except for the narrative, commencing near the top of page 5, covering procedural matters subsequent to the hearing before the Circuit Court of Appeals on March 23, 1939.

In respect to this jurisdictional statement, we invite attention to what we have already said on pages 2 and 3 of appellee's earlier brief, to which we add our objection to appellants' statement, on page 6 of their later brief, that "the New Federal Rules of Civil Procedure are applicable to the above cause." We respectfully urge, as we urged at the very outset of appellee's earlier brief (p. 1), that, because of an order made by the trial judge upon application of appellants themselves [Tr. p. 162], pursuant to Rule 86 of these New Federal Rules of Civil Procedure, this appeal is governed by the procedural rules in force prior to September 16, 1938, the new rules, in the words of District Judge James, not being considered feasible to work justice in this action. Appellants having themselves elected to proceed under the old rules, and having obtained a specific court order therefor, are bound thereby and their appeal should be determined upon the transcript of record originally filed herein and upon the briefs of the respective parties originally filed herein. In this connection we refer to the typewritten brief filed by us pursuant to the order of the Circuit Court of Appeals made herein under date of April 20, 1939, which authorized counsel for the respective parties to file briefs, in typewritten form, by May 5, 1939, on the question of the applicability of the

new Rules of Civil Procedure for the District Courts of the United States to the above case, in the light of the decision of the Supreme Court of the United States in *McCrone v. United States of America,* decided April 17, 1939 (83 L. Ed. Advance Opinions 752). We respectfully repeat that, under the circumstances of this case, appellants are not entitled to relief from their procedural omissions and neglect by filing and relying upon a Supplemental Transcript of Record under cover of Rule 86 of the New Rules of Federal Procedure.

Statement of the Case.

The matter contained in appellants' Statement in their later brief (pp. 6 to 14) is largely a restatement of what appears under the same heading in their earlier brief (pp. 5 to 10), except for the urging of an additional point predicated upon the statement that "some of the findings of fact in the above cause are contradictory and contain, in the opinion of appellants, negative pregnants".

In reply we respectfully refer to what we have stated on pages 4 to 9 of appellee's earlier brief. As to the additional point concernings findings, we shall discuss it later on in this brief. For the time being, however, and in view of the fact that we now have before us a Supplemental Transcript of Record which, in conjunction with the Transcript of Record originally filed herein, gives us the entire record of the testimony and proceedings at the trial court and the exhibits introduced, we are in a position to set forth in fuller detail certain facts which are important to any Statement of the case on an appeal wherein the evidence justifying the trial court's decision is challenged.

An analysis of that record discloses the following:

The Bank was in financial difficulties—in that its capital was impaired—at least as early as February 1930. Lamm, the national bank examiner, found an impairment of capital when he made his examination on February 7, 1930, and immediately thereafter he took up with the board of directors ways and means of restoring this impairment [Supp. Tr. pp. 93 to 96, and 104]. Speaking of a board meeting, called after this examination he says:

> "We discussed the possible effect of an assessment, and finally talked about a contribution. The question was raised at that time, if the directors contributed money to the bank would there be any chance of them getting it back again. We devised a scheme whereby if they contributed to the bank what they would do would be to actually buy the depreciation in the bond account. That would give them a possibility of return of the money that they put in the surplus account or undivided profit account" (*ibid.* p. 94).
>
> "This 'buying the depreciation' was something new. You could always restore the capital of a bank by buying its bad assets" (*ibid.* p. 95).

The only time this method of repairing the impaired capital of a national bank had been used was about 1929 and that was in connection with another bank in his territory—the First National Bank of Huntington Beach, which was later merged into a state bank. It was his idea. The office of the Comptroller of the Currency never indicated approval of this as being a proper method to repair impaired capital nor did it notify disapproval to him (*ibid.* pp. 99-100-103).

On May 29, 1930, at a meeting of the board of directors of the appellee Bank, the following motion was adopted:

> "That a reserve fund be created by voluntary contribution of stockholders to offset depreciation in bond account, and that stockholders contributing will be reimbursed from said reserve fund which shall be built up by appreciation in the bond account or by any other earnings in the Bank" (*ibid.* p. 105).

In reply to correspondence with the Comptroller's office on this subject, the Deputy Comptroller under date of July 2, 1930 wrote to the Board of Directors in part as follows:

> "Receipt is acknowledged of the President's letter of June 11, advising that a contribution of $30,000 has been made by certain stockholders and that that amount, together with $10,000 from undivided profits, has been set up as a reserve against the depreciation in your bond account which, according to a recent appraisal, is said to amount to $39,076.
>
> "The report of an examination of the bank, completed on February 7 by National Bank Examiner R. Foster Lamm, showed depreciation of $59,991.88 . . .
>
> "From the resolution, a copy of which was incorporated in the President's letter, it does not appear that the contribution was made under such terms and conditions as to provide for the impairment. It appears on the contrary that those who supplied the funds for the 'contribution' are to be reimbursed out of the earnings of the bank. If the understanding is that the 'contributors' are to be reimbursed by the bank, there has merely been a substitution of sound assets for losses and a corresponding in-

crease in liabilities so that the difference between the value of sound assets and the amount of liabilities is not different from what it was before the funds were paid into the bank. It is then the position of this office that the impairment of capital, shown in the examiner's report, still exists with such changes as may be warranted by changes in the values of assets.

"An impaired capital may be restored in the manner prescribed by Section 5205 involving an assessment of the stock. If restoration of the capital in the manner provided by that section is not desired, restoration may be accomplished through voluntary and unconditional contributions to the bank, or by the purchase for cash of the assets estimated by the examiner as losses. Contributions of cash or purchases of assets to eliminate an impairment of capital *must,* however, be unconditional and there *must* be no obligation on the part of the bank to repay the contribution or to repurchase the assets should they prove uncollectible. . . .

"You are advised, therefore, that unless advice is received shortly that the 'contributions' referred to in the President's letter of June 11 have been voluntarily made without any conditions whatever as to repayment by the bank, the losses shown in the examiner's report will not be regarded as having been provided for . . ." (Italics ours). [Supp. Tr. pp. 87 to 90.]

According to bank examiner Lamm, this letter of the Deputy Comptroller is composed of "more or less stereotyped paragraphs" representing the policy of the Department, and that it was the general instruction or advice with which he was familiar (*ibid.* p. 98).

This letter was brought to the attention of the meeting of the board of directors held on July 16, 1930, the minutes of which state:

> "Letter from the Treasury Department, addressed to the Board of Directors of the Anaheim First National Bank, dated July 2nd, 1930, was read and the President was instructed to reply to this letter, copy of which reply is being held on file at this Bank."

This letter remained in the files of the Bank and was incorporated into the minute book itself (*ibid.* pp. 25 and 106).

President Dolan's reply to the Deputy Comptroller dated July 17, 1930 stated:

> "In reply to your letter will say that under date of July 16, 1930, the following agreement was signed by the stockholders of this Bank who contributed the sum of $30,000, which amount was placed in a reserve account for depreciation of bonds:
>
> "The undersigned stockholders of the Anaheim National Bank, having contributed the sum of $30,000, which amount was placed in a reserve account with said bank for the purpose of covering a partial depreciation in the Bond Account of said Bank, have made said contribution with the understanding that we have purchased the depreciation in the Bond Account and do not hold the Bank responsible for repayment of above amount" (*ibid.* p. 91).

By the fall of 1930 Mr. Lamm had left the district, having been succeeded by Mr. Waldron as examiner for the district (*ibid.* p. 96). Ever since that time Waldron has been such examiner (*ibid.* p. 176).

Waldron recalls that late in 1930 there was a program still in process of possibly increasing the capital

stock of the Bank and selling the stock at a premium to take care of the depreciation in the bond account, but that program did not go through. He discussed with the Bank officials the matter of its impaired capital, for the first time probably immediately after or during his examination of the Bank in December 1930 (*ibid.* p. 177). Mr. Dolan told him of a plan which would be in the nature of a voluntary payment, but along the line of a purchase of bond depreciation (*ibid.* pp. 177-179).

On June 18, 1931 the Board of Directors held a meeting at which a motion was carried that a committee be selected to collect $175.00 per share from stockholders, to be used to purchase depreciation in the bond account (*ibid.* p. 17).

Under date of June 26, 1931 President Dolan wrote to the Deputy Comptroller (who had apparently been prodding the Bank on the subject of the Bank's capital stock) as follows:

> "Replying to your letter of June 19, 1931, regarding proposed increase in the bank's capital stock, will say that we have decided not to increase the stock at this time. Under date of June 18, 1931, at a meeting of the directors of the Bank, it was agreed that the directors and other stockholders would cover the depreciation in the bond account, and raise the amount necessary for this purpose at once.
>
> "Will also state that we were examined by National Bank Examiner Waldron on June 22nd, 1931, and he recommended and approved the above plan.
>
> "Will notify you as soon as the amount necessary to cover the depreciation in the bond account has been raised.

> "Trusting that this is satisfactory and meets with your approval . . ." (*ibid.* p. 78, Plaintiffs' Exhibit 3).

Waldron says he had never heard of buying depreciation of a bond account as a method of curing impaired capital; this was his first acquaintance with it; and he has never heard of it with reference to any other national bank. As to it being a feasible plan he testified:

> "I said that it might—essentially, that it might be possible; but that it also might be open to attack by the Comptroller's office" (*ibid.* pp. 177-179).

At his request a director's meeting was held about the middle of July 1931, at which he attended (*ibid.* 179-180). As to the discussion at that meeting:

> "Well, a considerable part of the money, or possibly all of the money that was eventually raised had been raised at that time. The matter of how the bookkeeping would be arranged, I recall that I was very insistent that if this plan of purchase of bond depreciation would go over, there must be a very definite method of bookkeeping as to the particular bonds, the depreciation in the particular bonds that were purchased; and if there was any exchange, that the record follow clearly through, if there was any break in the record, and certainly if otherwise they could recover their money, they would not be able to unless they kept a very clear record" (*ibid.* pp. 80 and 81).

He examined the Bank's books at regular six-months intervals thereafter. He does not think they ever kept such a record on the official books of the Bank. He never

received from the Comptroller's office any approval of this method of buying the bond depreciation, and he never represented to any of the officers or directors or anybody connected with the Bank that this plan was approved by the Comptroller and would be agreeable to the Comptroller (*ibid.* pp. 180-182). Neither the receiver nor his assistant found, after the Bank was taken over by the receiver, any records showing any segregation in respect to bonds or any lists made each six months or at other stated intervals; and the bond account was kept just the same after as before June 24, 1931 (*ibid.* pp. 183-184).

Examiner Lamm himself did not remember whether the proposed method of repairing the impaired capital by buying bond depreciation was ever put into practice by the Bank during the period when he was examining because he passed out of the picture (*ibid.* p. 102).

In any event at the meeting of the Board of Directors held July 17, 1931, a resolution was passed as follows:

> "Resolved, that the $115,650 which has been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, and the $25,000 now held on books of the Bank in Reserve Account, be applied as follows:
>
> "Take up five notes of $6,000 each formerly placed in Bank's assets by certain stockholders on account of bond depreciation.
>
> "The balance of said amount to be applied directly against the Bond Account of this Bank on account

of estimated depreciation, which will reduce the present total of Bond Account by $110,650. Be it further resolved as further payments be received from stockholders on account of purchase of bond depreciation, that such sums shall be applied on Bond account as above specified" (*ibid.* pp. 19-20).

It will be remembered that this subscription document, or whatever it may be called, was worded as follows:

"In compliance with action of the Board of Directors taken at a meeting held June 18, 1931, recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned, the undersigned hereby subscribe to such fund in the amount set opposite our names.

"It is the intention that interest received from bonds equaling the amount of depreciation purchased be set aside for the use of the undersigned. The appraisal of the bond list shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided pro-rata among the stockholders who purchased depreciation in bond account" (then follow signatures and sums) (*ibid.* pp. 80-81).

Under date of August 20, 1931, the Deputy Comptroller wrote to the Board of Directors of the Bank in part as follows:

"A capital impairment of $94,400.53 was shown by National Bank Examiner W. J. Waldron in his

report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931 are reported to have amounted to $115,650.00. . . .

"Please write this office on September 1 and advise whether the committee appointed to collect from stockholders has succeeded in making the additional collections, and submit a list showing the individual cash contributions, and the contributions that have been made in the form of notes. . . .

"Also please have executed and forwarded the enclosed form marked 'affidavit' certifying to the fact that capital has been restored to $75,000.

"*Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital should be made unconditionally and without expectation of reimbursement.* Please advise in your reply to this letter that you have the correct understanding in this regard . . ." (*ibid.* pp. 41-42). (Italics ours.)

Under date of September 8, 1931, President Dolan wrote to the Deputy Comptroller in part as follows:

"We have your favor of August 20 and wish to make the following reply to your letter of the above date.

"Regarding the amount of $94,400.53 which was shown by the National Bank Examiner as being a

capital impairment, will say that the above amount was estimated on account of an estimated depreciation in our bond account. The following stockholders purchased the depreciation with the understanding that the bonds were to be held or exchanged with a view of the same liquidating the amount subscribed:"

(Here follow names and amounts)

* * * * * * * * *

"We enclose form marked 'affidavit' certifying to the fact that capital has been restored to $75,000 . . . " (*ibid.* pp. 43 to 46).

In the minutes of the regular monthly meeting of the Board of Directors of the Bank held September 17, 1931, there is the following entry:

"A letter from the Treasury Department dated Aug. 20th and Mr. Dolan's reply thereto dated September 8th were read and ordered filed" (*ibid.* p. 187).

Under date of October 30, 1931, the Deputy Comptroller again wrote to the Board of Directors of the Bank, in part as follows:

"Referring to the president's letter of September 8 . . .

"It should be clearly understood by all parties concerned that these contributions are voluntary

and unconditionally made, with no expectation of reimbursement from the profits or earnings of the bank . . ." (*ibid.* p. 56). (Italics ours.)

In the minutes of the regular monthly meeting of the Board of Directors of the Bank held on November 19, 1931, we find the following entry:

> "A letter from the Comptroller under date of October 30th was read and it was directed that a reply be made thereto" (*ibid.* p. 50).

Under date of November 20, 1931, President Dolan wrote to the Deputy Comptroller, advising him that his letter of October 30, 1931 had been read to the Board of Directors at its meeting held on November 19th (*ibid.* p. 57).

It is also to be noted that at the annual meeting of stockholders of the Bank held on January 12, 1932, the following resolution was adopted:

> "That all and singular actions of the officers of the bank for the past year be and they are hereby ratified, confirmed and approved" (*ibid.* p. 193).

To Mr. Tuffree, a stockholder and director, the following question was put:

> "Q. And these sums of money were raised for the purpose of keeping open the bank and not having the Comptroller close it down or take it over or administer it through a Receiver, is that not the fact?"

To which he replied:

"A. That was the purpose, as I remember it" (*ibid.* p. 67).

The record of this case discloses that no notice or reply was ever sent to the Comptroller stating that he was under a misapprehension if he thought that these sums were voluntary and unconditional contributions, made without expectation of reimbursement. Never, it appears, was a copy of this subscription document (Plaintiffs' Exhibit 4) sent to the Comptroller. Nor apparently (*ibid.* p. 97) was it ever referred to examiner Lamm for his advice or consultation.

In their later brief (p. 8) appellants are obliged to admit that the money subscribed during or about June 1931 was subscribed "under like circumstances" as the above referred to money subscribed in 1930. If so, they were amply forewarned of the unconditional and voluntary character of such contributions. This negatives the statement made in their earlier brief (p. 8), and repeated in their later brief (p. 9), that "The first notice received by the directors and stockholders of the bank that the Comptroller's office viewed their subscriptions as a purchase with distaste, and felt that the money already paid in should be a voluntary contribution was subsequent, to-wit, August 20, 1931, some time after they had paid in the amounts subscribed by them."

We shall reserve for comment—in connection with our reply to part VII of appellants' brief—appellants' challenge (pp. 11 to 14) of certain findings of fact.

Reply to Appellants' Summary of Their Argument and Points of Law.

(1) Under point 1 of their earlier brief (p. 11) appellants apparently took the position that the contributions made by the stockholders and directors were made with the intent to enter into an agreement with the Bank that their contributions were a loan. In their later brief (pp. 14 and 15) they appear alternately to assert and then abandon this position, at times taking the position that the intent was to enter into an agreement to purchase the depreciation in the bond account. Here they attempt to assimilate this purchase of depreciation in the bond account to the purchase for cash of assets of the Bank which the bank examiner has condemned as losses—which latter is a recognized method of restoring impaired capital. We repeat here—what we have stated in our earlier brief (p. 10)—that we are unable to fathom the startling result claimed by appellants and stated thus: "This creates a conclusive presumption as against the appellee that such a method of repairing impaired capital losses was valid and satisfactory to the Department." The authority cited sustains no such point.

(2) Point 2 of appellants' later brief (p. 15) is a reprint of point 2 of their earlier brief (p. 11), and accordingly we respectfully refer to what we have stated in answer to that point on page 10 of our earlier brief.

We must add, however, what is very clear from the Supplemental Transcript, namely, that the Comptroller did not, as appellants infer, merely indicate that contributions to repair impaired capital should be voluntary and without expectation of reimbursement. He insisted that they "must" be so, using the very word "must" in his letter

of July 2, 1930 [Supp. Tr. p. 89]. The adjudicated cases, without exception, support him.

(3) Point 3 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 3 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to that point on page 11 of our earlier brief.

(4) Point 4 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 4 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to this point on pages 12 and 13 of our earlier brief.

(5) Point 5 of appellants' later brief (p. 16) and the authorities cited in support thereof are a re-print of what is set forth under point 5 of their earlier brief (p. 12); and accordingly we respectfully refer to what we have stated in answer to this point on page 14 of our earlier brief.

(6) Point 6 of appellants' later brief (p. 17) is new in form but is in substance and effect a re-statement of what appears in the latter part of their earlier brief (pp. 27 and 28). We shall reserve this point for discussion hereinafter in replying to part VI of the Argument in appellants' later brief.

(7) Point 7 of appellants' later brief (p. 17) is likewise new in form and not to be found in appellants' earlier brief, unless what is set forth on page 29 of said earlier brief is to be considered as bearing upon the subject. We shall reserve this point for discussion hereinafter in our reply to part VII of the Argument in appellants' later brief.

Reply to Appellants' Preliminary Observations.

The Preliminary Observations set forth in appellants' later brief (pp. 18 to 20) are largely a re-statement of what appears in their earlier brief (pp. 13 and 14); and accordingly in reply thereto we refer to pages 15 and 16 of our earlier brief. We note that here again in their later brief appellants have alternated their views as to the character of the subscriptions. Whereas in their earlier brief they contended that the evidence showed "the intent to make such contribution as a loan to the bank" (p. 13), they now merely urge the evidence shows "the intent of being reimbursed" (p. 18).

In this connection we must again draw attention to the fact that—contrary to appellants' reiterated intimations that there was no definite prohibition against loans to the Bank to restore its capital and that the Comptroller merely said that they *should,* rather than that they *must,* be made unconditionally and without expectation of reimbursement—the whole record which is now before this court shows clearly that there was a definite requirement and policy prohibiting loans or contributions with strings attached to them. This is obvious from the letters of the Deputy Comptroller to the Bank under dates of July 2, 1930, August 20, 1931 and October 31, 1931. As the Deputy Comptroller says:

> "If the understanding is that the 'contributors' are to be reimbursed by the bank, there has merely been a substitution of sound assets for losses and a corresponding increase in liabilities so that the

difference between the value of sound assets and the amount of liabilities is not different from what it was before the funds were paid into the bank" [Supp. Tr. 88].

Here again appellants are constrained to admit that the transaction in 1930 was "one involving exactly the same circumstances" as the transaction in 1931 (App. Later Br. p. 19).

Appellants in their later brief (p. 19) state that the Comptroller at no time voiced disapproval of the refund to the contributing stockholders of the sum of $30,000.00 contributed in the 1930 transaction. In the first place, where does it appear that he knew of such refund? Right from the beginning in 1930 he had made it clear that this $30,000.00 had to be voluntary contribution, without strings attached to it; and as a matter of fact the original plan of the directors which called for reimbursement [Supp. Tr. p. 105] had to be and was revamped accordingly [Supp. Tr. p. 91]. The Bank had actually furnished the Comptroller with an affidavit certifying to restoration of capital [Supp. Tr. p. 46]. It is clear that the whole communicated policy and attitude of the Comptroller was against reimbursement of $30,000.00, if such implied a diminution of the assets of the Bank; and certainly if the Bank, through its lack of frankness in its dealings with the Comptroller's office, lulled that office into a sense of security that the impairment had been repaired, whereas in fact it had not, the Bank has no standing in court or conscience to take advantage of such a deception. We must remember that banks are in a special relationship to the public, whose interests are prime and controlling.

I.

Reply to Part I of Appellants' Argument.

Part I of appellants' argument as appearing in their later brief (pp. 20 to 23) is substantially a re-statement of what appears in part I of the argument in their earlier brief (pp. 15 to 20); and accordingly in reply we refer to what we have stated on pages 17 to 33 of our earlier brief.

We note that, whereas in their earlier brief (p. 18) appellants made the frank statement that "The contributions were made solely for the benefit of the bank and in order that the bank could remain open and not be declared insolvent," they limit the statement in the later brief (p. 20) to this, that "The subscriptions were made solely for the benefit of the bank," adding thereto that such subscriptions were made "pursuant to the instructions and information given to them direct from the Department in the letter from C. H. Gough, Deputy Comptroller of the Currency, under date of July 2nd, 1930, that they might purchase for cash assets estimated by the examiner as losses." This addition may sound plausible but we are not to be misguided thereby. Cash assets estimated by the examiner as losses are tangible, definite things, as, for instance, "sour" promissory notes or securities of debased value. Having been carried at a certain valuation the Bank Examiner determines that they cannot be carried at that valuation any longer and must be eliminated or reduced as assets. Thereupon persons interested in the Bank may, if they wish to avoid correcting the condition by the assessment method or by the cash contribution method, buy such assets at the valuation at which they have been carried on the books of the Bank, thereby substituting good assets for bad assets.

The bad assets then wholly pass out of the Bank's portfolio. This purchasing of the "sour" notes or debased securities is quite different from buying the so-called "depreciation in the bond account"—which, we submit, is intangible, indefinite and impractical under the circumstances. It was not what the Comptroller meant when he stated that impairment of capital could be corrected by purchasing for cash assets estimated by the examiner as losses.

In this connection it is important to recall that after appellants' so-called purchase of said depreciation in the bond account, the bond account was carried on the Bank's books and in the Bank's public statements precisely the same as it had been carried before such alleged purchase, the Bank, so far as the public and the Comptroller were concerned, being represented as possessing and owning bonds of such-an-such a value, without condition or limitation whatsoever attached thereto.

II.

Reply to Part II of Appellants' Argument.

Part II of appellants' argument as set forth in their later brief (pp. 24 and 25) is a re-print of what appears in part II of their argument in their earlier brief (pp. 23 and 24); and accordingly in reply we refer to what we have stated on pages 34 to 37 of our earlier brief.

In this connection we again point out, what we have already adverted to, namely, that with the entire record before us it is clear that prior to the date of the 1931 transaction the Comptroller had cautioned the Bank that contributions to repair impaired capital must be consid-

ered as voluntary and unconditional. As to appellants' contention that the 1930 transaction was a totally different transaction—it may have been different in time but it was certainly not different in character. Appellants themselves admit in their later brief (p. 19) that the 1930 transaction was one "involving exactly the same circumstances" as the 1931 transaction.

III.

Reply to Part III of Appellants' Argument.

Part III of appellants' argument as set forth in their later brief (p. 26) is a composite of argument III in their earlier brief (p. 25) and point 3 of their Summary of the Argument and Points of Law in said earlier brief (p. 12). Much of what we stated on pages 11 and 38 of our earlier brief is applicable in reply. The bond account—valued at about $384,000 in latter June, 1931 [Supp. Tr. 153]—actually became worse thereafter, because it suffered a further depreciation, upon sales and disposals in liquidation, of about $136,400 net (*ibid.* p. 188). The trial judge, whose province it was to pass upon the evidence, did so and made his finding adverse to appellants in this connection.

The important thing to bear in mind, however, is that the trial judge found, contrary to appellants' contentions, that on or about July 17, 1931 the respective appellants paid in cash, or gave notes for, sums aggregating $115,650, as voluntary and unconditional contributions to the Bank, without any obligation whatsoever on the part of the Bank to repay same; that these payments were made to repair the impaired capital of the Bank; that on various occasions between July 1930 and November 1931 the Comptroller of the Currency notified and instructed the

Bank, its officers and directors, that payments made to repair the impaired capital of the Bank must be considered voluntary and unconditional contributions, without obligation of repayment; that appellants acquiesced in this notification and instruction; that it was not true that, by reason of the appointment of a receiver and the liquidation of the Bank's assets, there had been any failure of consideration; that none of the claims filed by appellants against the Bank are valid; and that while said sums have not been repaid to any of appellants, it is also true that the Bank is in no way obligated to repay same (see findings V, VI, IX, X and XI). It has been determined that appellants' contentions as to their alleged agreement are not the real facts of the situation, and accordingly, even assuming an appreciation in the bond account, they would not be entitled thereto.

IV.

Reply to Part IV of Appellants' Argument.

Part IV of appellants' argument in their later brief (p. 27) is in part substantially a re-statement of what they set forth under point 4 of their Summary of Argument and Points of Law in their earlier brief (p. 12), with the addition of the following statement:

> "There is no way at this late date, in fact there is no way at all, of telling whether or not the bonds were liquidated at the best price which the market would bring, but we do know that by their liquidation the appellants were deprived of the sole consideration for which they paid their money."

In other words, appellants re-assert that there was a failure of consideration.

In reply we refer to what we have said on pages 12 and 13 of our earlier brief, and we again repeat what we have emphasized in our earlier brief, namely, that the real consideration for which these sums were contributed was to continue the Bank as a going concern. It continued as a going concern for approximately two and one-half years thereafter. This was ample consideration, as authorities such as the following, cited in various parts of our earlier brief, clearly show:

Delano v. Butler, Receiver of Pacific Nat. Bank, 118 U. S. 634;

Coast Nat. Bank v. Bloom, 174 Atl. 576 (N. J.);

Wright v. Gurley, 63 So. 310 (La.);

Interstate Trust & Banking Co. v. Irwin, 70 So. 313 (La.);

Union Bank of Brooklyn v. Sullivan, 108 N. E. 558 (N. Y.).

There is an interesting annotation in 95 A. L. R., p. 534, which discusses consideration for notes given to make good the depleting of the capital of a bank, including the subjects of failure of consideration, at page 542, and estoppel, at page 543, in connection therewith.

It is clear there has been no failure of consideration, the Bank having remained open for two and one-half years after this restoration of impaired capital; and even if there were a failure of consideration appellants, as a matter of necessary public policy, would be estopped to assert it.

V.

Reply to Part V of Appellants' Argument.

Part V of appellants' argument as set forth in their later brief (p. 28) is based on point 5 set forth in their earlier brief (p. 12), with the preliminary statement that their alleged agreement entered into with the Bank "in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed, three years later."

In reply we have this to say:

As to recognition of the validity of the alleged agreement, there certainly never was such recognition by the Comptroller of the Currency. The officers of the Bank never even furnished the full text thereof to the Comptroller and, as is obvious from the correspondence, the Comptroller's office at all times assumed that the sums paid in were voluntary and unconditional contributions. How the stockholders and officers *inter sese* may have regarded the alleged agreement is wholly immaterial. It is, under the cases, even immaterial how the Bank Examiner may have regarded it. We are here concerned with special rules and policies predicated upon the circumstance that this Bank was a national bank, and thus a sort of public institution.

The difficulties respecting the claims presented to and filed with the receiver were difficulties not of formality but of substance. Formal claims had indeed been presented to and filed with the receiver, but such formal claims could rise no higher than the legal basis upon which they were founded, and there being no legal basis for them, they were not valid or proper claims. The trial court, having heard the evidence, found that while such

claims had been filed, they were not valid or proper claims (Finding IX). This was necessarily so in view of other findings adverse to appellants.

The case of *Eisele v. First Nat. Bank,* 137 Atl. 827, cited by appellants, has already been discussed by us on page 14 of our earlier brief.

VI.

Reply to Part VI of Appellants' Argument.

Part VI of appellants' argument as set forth in their later brief (p. 29) is substantially the same as what is set forth at the bottom of page 27 and at the top of page 28 in their earlier brief.

We are unable to fathom how appellants have reached the conclusion that "under no theory could the appellee retain the amount of the subscriptions of appellants herein under an unlawful contract made in contravention of statute." They seem to assume that appellee's sole theory on defense was: that a contract was indeed made between the stockholders and the Bank in 1931 but that such contract was unlawful. The question of unlawfulness arose only incidentally. Appellee contended that appellants were not entitled to recover herein on the basis of any agreement of the sort and effect urged by them in their complaint, and that if in fact an attempt had been made to meet the Bank's precarious financial situation by the method provided for in such alleged agreement, the same would have been unlawful because contrary to public policy and the rules governing the administration of national banks, and that under the circumstances of the case appellants would be estopped to set up such an agreement as a basis for recovering their contributions.

As appellants lay special stress on this part of their argument—which must be considered in conjunction with point 6 of their Summary of Argument and Points of Law (Apps. later Br., p. 17)—we feel it should be given particular attention.

In the first place, let us analyze the five cases cited by appellants (*ibid.* p. 17). They constitute five of the nine cases cited in the later brief and not appearing in their earlier brief. Four of them—*Silverthorn v. Percy,* 120 Cal. App. 83, *Butterfield Const. Co. v. Federal, etc.,* 5 Cal. App. (2d) 16, *Teachout v. Bogey,* 175 Cal. 481, and *Moffatt v. Boulson,* 96 Cal. 106—merely stand for the proposition that one cannot enforce, or recover damages predicated upon, a void or illegal contract. They say nothing about being entitled to be replaced—so far as reimbursement is concerned—in *status quo ante.* In our case appellants are seeking reimbursement, or what is analogous thereto. The fifth case—*Wood v. Imperial Irr. Dist.,* 216 Cal. 748—when properly interpreted is rather in favor of appellee than appellants. In that case the Superintendent of Banks sued the District, a depositor of a closed bank, to recover the proceeds of certain securities which the bank, under an unlawful agreement in connection with a deposit by the District, delivered to the District as security for such deposit. The court held that "the deposit was not forbidden by law, but . . . the giving over of the bonds as security for the deposit was unlawful" (p. 761). The Superintendent was held entitled

to recover the proceeds of the bonds. The court referred to the matter of public policy, in part saying, at page 761:

> "Banks publish statements of their assets and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits when its assets were secretly pledged . . . We are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors."

The following cases are, we believe, determinative of the point, adversely to appellants.

In *Reed et al v. Mobley, Superintendent of Banks,* 157 S. E. 321 (Ga.), where certain stockholders of a closed bank asserted that sums paid by them—under a special agreement set forth in the decision—to restore the impaired capital of the bank should be set off against their stockholders liability or should be declared impressed with a trust and refunded to them, the court held that:

> "Any agreement between the bank and its stockholders, by which the latter should not be required, in the event the superintendent of banks took it over for liquidation, to pay assessments levied against

them on their stock for the purpose of paying depositors, if they had paid their assessments to make good the impaired capital stock, was illegal and void; and such stockholders would not be entitled to recover from the bank, or the superintendent of banks, when it had been taken over by this officer for liquidation, amounts so paid by them on the assessments against their stock. Markus v. Austin, *supra*; Austin v. Fleming (Tex. Civ. App.), 290 S. W. 835; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Scoville v. Thayer, *supra*; Austin v. Connellee (Tex. Civ. App.), 292 S. W. 613." (Page 326.)

In *Utley v. Clarke,* 16 Fed. Supp. 435, the plaintiff sought to recover the market value of certain bonds loaned by him for the purpose of repairing the impaired capital of a bank which later went into liquidation. The court said, at pages 439 and 440:

"While, if the bank were solvent and a going concern, plaintiff might recover, he cannot recover when he has been party to a deception upon the depositors and creditors of the bank and upon the Comptroller of the Currency when the bank becomes insolvent and his securities are taken by the receiver. He is estopped from asserting his claim as against depositors and other creditors." (p. 439.)

"It is quite true that plaintiff may not have fully realized the effect of the way in which the loan transaction was carried on. He in all probability left everything to Clarke (the bank president). That, however, does not excuse him.

"Nor could plaintiff recover against the bank if Clarke failed to carry out representations made to plaintiff of the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using the $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or which plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed. Federal Reserve Bank v. Crothers, 289 F. 777, 779, *supra.*" (p. 440.)

In *Fallgatter v. Citizens' Nat. Bank,* 11 Fed. (2d) 383, it appeared that the plaintiff, a stockholder of defendant bank, paid into the bank, for the purpose of charging off worthless paper and making good a capital impairment, a certain sum pursuant to an assessment agreement made at a directors and stockholders' meeting. This sum, along with similar sums of other stockholders, was to be placed in a special fund, earmarked for making good such impairment, and called "Special Assessment Account" on the ledger of the bank. It was not to be used for any other purpose than the payment of an assessment of 100 per cent, if and when a formal notice of impairment was received from the Comptroller of the Currency. No formal notice of impairment was ever received and the money was in fact mingled with the general funds of the bank and used for the same purposes as the funds of other depositors. The detailed facts, as set forth in the court's opinion, should be read. The bank eventually went

into receivership and the plaintiff stockholder sued the bank and its receiver to recover the amount of the assessment so paid in by him. He was not allowed to recover. Of interest is this, among other statements by the court:

> "Even if the plaintiff and the other directors had the right originally to insist that the funds contributed by them be held itnact, and only released upon the conditions outlined in the ledger sheet, it was a right which they could waive. They controlled the bank and had access to it at all times. It was their business to keep in touch with it, knowing of its precarious condition. There would be a strong inference that the officer in charge acted properly and with authority. It does not seem possible that the plaintiff can now claim, under all the circumstances, that his bank, without his knowledge and consent, misappropriated a special deposit made by him. The purpose of the assessment was so clearly to immediately increase the solvency of the bank, which a special and conditional deposit would not have done, that a court would not be justified in finding to the contrary." (Page 385.)

There is, we believe, considerable analogy between cases such as the above and cases wherein stockholders, when sued on their statutory double liability, seek to avoid same by setting up, as a defense, some sort of agreement with the bank, its officers, or the bank examiner or Comptroller, the effect of which would be to release them, in whole or in part, from their said statutory double liability. In these cases it is uniformly held that such an agree-

ment is unlawful and void and cannot be asserted as a defense, even though the stockholder has, believing it to be lawful, fulfilled his part of it. For instance, take the case of *Page v. Jones,* 7 Fed. (2d) 541, wherein the court says at page 545:

> "There is no foundation for the claim that the defendant is relieved of his statutory liability to his creditors by the alleged fact that he was deceived and defrauded into paying his 110 per cent. into the bank by the false and fraudulent representations of its officers and directors relative to its prospective financial condition and the legal effect of that payment. The creditors of the bank were not responsible for the acts or representations of the officers and directors of the bank to their shareholders, and if they defrauded the shareholders their remedy is against them, and not against the creditors of the bank and their creditors. Ryan v. Mt. Vernon Nat. Bank, 224 F. 429, 140 C. C. A. 123; Blakert v. Lankford, 74 Okl. 61, 176 P. 532."

See also *Markus v. Austin,* 284 S. W. 326 (Tex.) where the state commissioner of banking and the defendant stockholder of a bank entered into an agreement that, on payment of an assessment restoring impaired capital, the stockholder would not be held liable for his statutory double liability. This agreement was void as against the provisions of law and as a fraud on creditors of the bank. The amount of the assessment so paid could not, after the bank went into liquidation, be offset against the amount of the stockholders statutory double liability.

VII.

Reply to Part VII of Appellants' Argument.

Part VII of appellants' argument in their later brief (p. 30) is new. It is asserted that findings of fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. Appellants then cite authorities to the effect that a finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation, and to the effect that if one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Appellants are in error both in analyzing the findings of fact and in applying the law. They have plucked two findings—numbers V and X—from twelve findings, ignoring important findings affirmatively and specifically finding on ultimate facts.

In comparing the findings with the pleadings and issues it will be noted that there are certain specific findings that such-and-such things are "true", and there are other findings, mostly following the allegations of the complaint and not inconsistent with such specific findings, finding that such-and-such things are "untrue". There is clearly nothing wrong with this. Certain findings affirmatively establish facts supporting defendant's contentions and other findings incidental thereto negative plaintiffs' contentions. Were the findings solely in the form "it is not true" or "it is untrue" there might be some plausibility to appellants' argument, but the findings in the instant case were not solely in that form. The authorities cited by appellants involve findings simply negativing affirmative allegations of the pleadings without specific

findings as to what the facts were—in other words, without findings of the "it is true" sort; or they involve cases where findings of the "it is true" sort are directly contrary to findings of the "it is not true" sort.

The true rules of construction of findings are, we submit, these:

> "It is settled law that findings should be reconciled and every inference drawn therefrom will support the judgment":
>
> *Hartford v. Pacific Motor T. Co.* (1936), 16 Cal. App. (2d) 378, at 381.

> "It is a familiar rule, too well settled and fixed to require citation of authority to sustain it, that the findings of a trial court must be so construed as to support the judgment, if possible, and that any apparent inconsistency between different portions of such findings must be reconciled in such a way as will give effect to the judgment, where this can be done upon any reasonable construction and interpretation of the language":
>
> *Wagner v. El Centro Seed Etc. Co.,* 17 Cal. App. 387, at 389.

> "It is also the rule that findings are sufficient if they can be made certain by reference to the record":
>
> *Ethel D. Co. v. Industrial Acc. Comm.* (1934), 219 Cal. 699, at 708.

Appellants' objections to our findings seem to be predicated upon the combinations of "it is true" and "it is untrue" findings. In this connection we merely refer to the following from 24 *Cal. Jur.* 986:

> "The following findings have been upheld: that all of the allegations of a complaint are true and the

> denials and allegations of the answer are untrue, that the allegations of a complaint are untrue and those of the answer are true, that the allegations or denials of an answer are true or untrue, that allegations of certain numbered subdivisions of a pleading are true or untrue, . . ."

We invite attention to the case of *Ford v. Cotton* (1927), 82 Cal. App. 675, where the court made a finding that the plaintiff, acting under his brokerage agreement, brought defendant into immediate touch with a ready and willing purchaser, able to buy at defendant's price and on terms acceptable to him, and did thus procure for defendant a *bona fide* purchaser at the price and on the terms and conditions prescribed in the brokerage contract, and that the arrangement made was "suitable" within the contemplation of the contract. The defendant in his answer had averred that the only terms and conditions on which he and one Ratteree had agreed were as to the initial payment of $25,000.00, and that the terms as to the balance of the payments were never suitably arranged between himself and said Ratteree. The court says, at page 683:

> "Upon conflicting evidence the court finds specifically, however, that *'it is not true* that the only terms and conditions relative to said sale upon which the minds of the defendant and said Allen Ratteree met was upon the initial payment; that *it is not true* that the terms as to the balance of the payments were never suitably aranged between plaintiff and said Allen Ratteree.' In view of the language of the brokerage contract and the issues tendered by plaintiff's answer,

the finding to the effect that the terms were agreed upon and were suitable is to be treated as a finding of an ultimate fact. Since the court found the ultimate fact in favor of plaintiff, it in effect found and concluded that contradictory probative declarations relied on by the defendant were untrue. (Tower v. Wilson, 45 Cal. App. 123, 124 (215 Pac. 542, 543).)" (Italics ours.)

Here we have both "it is true" findings joined up with "it is not true" findings, and the court found no objection thereto.

In the case of *Fritz v. Mills,* 170 Cal. 449, it was claimed that there was an absence of valid findings on material allegations in issue. The court says at page 458:

"We think this claim is untenable. It is based on the theory that the finding that all of the allegations of the third amended complaint, 'in so far as such allegations are controverted by the answer of the defendants thereto,' are untrue, is wholly insufficient because, as it is claimed, it cannot be ascertained which of the various allegations of the complaint the court believed to have been controverted by the answer. We do not concede this theory to be correct but we find it unnecessary to determine the question. Other findings are clearly sufficient. The findings proceed to declare 'that all of the denials and allegations contained in the answer of the defendants to said third amended complaint are, and that each and every of them is, supported by the evidence and true.' This is an unusual form of expression, but its meaning is clear and unequivocal. If the denials are true, the allegations denied must be untrue. The statement

is therefore equivalent to a finding that each allegation of the third amended complaint is untrue, a form of finding which has always been held sufficient (McEwen v. Johnson, 7 Cal. 260; Moore v. Clear Lake, 68 Cal. 151, (8 Pac. 816). There are many other cases of like effect."

In *Lee v. Day,* 55 Cal. App. 653, the court says at page 654:

"The appellant quotes the finding attacked as follows: 'That all the allegations set forth in plaintiff's complaint are not true,' and argues that this is not a finding that *'no one* of the allegations of the complaint is true, but the finding is as to all collectively; that *all* are not true.' The respondent has failed to file a brief or argue the question raised by the appeal. Appellant, however, has fallen into error in quoting the finding. The finding contained in the transcript is as follows: 'That each and all the allegations set forth in plaintiff's complaint are not true'; then follows the finding 'that all the allegations contained in defendant's answer are true.' In McLennan v. Wilcox, 126 Cal. 52 (58 Pac. 306), the finding claimed to be insufficient was as follows: 'That each of the averments of the answer are not true.' The court held the finding to be sufficient. While the use of the word 'untrue' would have been more appropriate than the words 'not true,' the criticism of the finding of which complaint is made is somewhat hypercritical, and under the authority of the case cited the finding must be held sufficient."

In *Tower v. Wilson,* 45 Cal. App. 123, it is said at page 132:

> "It is not necessary that the findings of the court on material issues shall follow the pleadings. If the findings, taken together, are such that the court can say the ultimate facts necessarily result therefrom, they are sufficient. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the code relating to such matters are met. (Millard v. Legion of Honor, 81 Cal. 340, 342, (22 Pac. 864); Mott v. Ewing, 90 Cal. 231, 235, (27 Pac. 194).) In another case in which 'the cause of action was single, but was stated in different forms in the complaint: First, for money loaned; second, for money had and received; and the third count set out a contract in writing,' what was done under it, and an agreement 'to repay to plaintiff all moneys he had paid or advanced under said contract,' the supreme court said: 'Appellant specifies that the issues under the first and second counts were not found by the court. These counts were upon the same cause of action as the third, and it so appeared upon the face of the complaint. As they rested upon the same facts, the facts found include them.'
>
> ". . . The trial court did find, however, that Wilson was 'not indebted to plaintiff in the sum of $148,750, or any other sum, for or on account of so much money had or received . . . from plaintiff for the use, or benefit, of plaintiff, or at all.' This was a finding upon the ultimate fact, the amount, if anything, due from defendant to plaintiff (Jacobs v. Ludemann, 137 Cal. 176, 182, (69 Pac. 965)), and, we think, necessarily included the whole controversy. (Southern California Ry. Co. v. Slauson, 6 Cal.

Unrep. 874, 876, (68 Pac. 107). See, also, Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 352, (123 Pac. 219).) It must receive such construction as will uphold rather than defeat the judgment predicated thereon. Whenever, from facts found, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. . . . In other words, the court having found the ultimate fact in favor of the defendants, in effect finds and concludes that the contra probative facts alleged by plaintiff are untrue In addition to the finding quoted, the court did find with great particularity that the transaction between plaintiff and Wilson was not as alleged, and testified to by plaintiff."

In sum and substance, therefore, we have, as a study of the record will disclose—and particularly findings V, VI, IX, X, XI and XII—specific findings that the contentions of the defendant were true, that the contentions of plaintiffs were untrue, that defendant was neither indebted to plaintiffs in respect to the causes of action predicated upon the alleged agreement or upon the causes of action predicated upon alleged money had and received (being an alternate statement of the same claim), that no evidence was presented proving appreciation in the value of the bonds and no evidence of any legal damage or loss sustained by plaintiffs, that the sums paid in by the respective plaintiffs were voluntary and unconditional contributions, without any obligation on the part of the Bank to repay same, etc. It appears to us that the findings are particularly complete, that they are far from involving negatives pregnant or contradictions, and that they are very clear and definite, and that if anything they are more complete than required by the rules of procedure.

VIII.

Reply to Part VIII of Appellants' Argument.

Part VIII of appellants' argument as set forth on pages 31 to 34 of their later brief is substantially a restatement of what has appeared in their earlier brief (pp. 26-28); and accordingly in answer thereto we refer to what is set forth on pages 39 to 46 of our earlier brief.

In this connection we invite attention to appellants' repetition in their later brief (p. 31) of the statement that "the appellants subscribed to the fund for the purchase of said depreciation *only as a loan to the Bank,* such moneys to be repayable to them by the Bank, if and when said bond account appreciated in value" (italics ours); that "it was not until subsequent to the time when they had already put up their money that the directors were notified by the Comptroller that this method *should* not be used" and "even then they were not definitely advised that such method *must* not be used"; and to the repetition of the statement (p. 32) that certain non-director stockholders "were never advised, nor in any way apprised, of the fact that the Comptroller's office at any time, or at all, whether prior or subsequent to the transaction in question, objected to their subscriptions being made in the form of a loan." It is difficult to understand how appellants can continue to insist on these matters in view of the record of the case—the explicit warnings of the Comptroller against the loan method, his statement that such method *must* not be used, and the circumstance that the officers and directors, being the representatives of the non-director stockholders, had at all times, prior and subsequent to the 1931 transaction, knowledge of the Comptroller's objections to the loan method.

It is to be noted that near the end of this part of appellants' argument they insist that they are "entitled to

an accounting from the receiver as to the proceeds of the bond account and are entitled to the proceeds now in the hands of the receiver from the disposition of said bond account." In reply to this it is, we believe, sufficient to invite attention to the fact that no accounting is asked for in the complaint nor was mentioned or requested at any stage in the proceedings until appellants filed their earlier brief in this appeal; that the complaint is merely predicated upon a definite sum of money allegedly owed in respect to an alleged agreement between the defendant Bank and the plaintiffs, which in the alternate form (causes of action Fifteenth to Twenty-eighth) is predicated upon the common count theory for money had and received by the Bank for the use and benefit of plaintiffs; and that the prayer prays for specific sums in favor of the respective plaintiffs against the defendant and contains no request for an accounting. The matter of equity relief was never brought to the attention of the lower court and the case was not tried, as is clear from the record, upon the theory that equity relief was being sought. As pointed out by us in our earlier brief, the action was filed as an action at law, was tried as an action at law, was appealed as an action at law, and such change in theory is not now permissible.

Again we repeat that the equities, if any are involved herein, are clearly in favor of the Bank which is now in receivership and liquidation for the benefit of outside creditors who obviously had no part in, or knowledge of, this 1931 transaction. We shall do no more than quote the following from *Heath et al. v. Turner, Special Deputy Banking etc. Commissioner,* 77 S. W. (2d) 9, at page 12:

> "Because of the notes executed by Heath and other officers and directors, the bank was permitted to continue business for nearly 3 years and by published

reports to hold itself out to the public as solvent. Regardless of the equities between the other stockholders of the bank and the makers of the notes, and the effect of the agreement as between them, a matter which it is unnecessary for us to determine, the agreement could not and did not operate to thwart and nullify the policy of the law to the prejudice of the creditors and depositors. They were entitled to have the capital stock remain unimpaired, and it was to this end that the notes were executed. The fact that the banking commissioner may have approved the notes with knowledge of the alleged agreement as to the condition upon which they were executed did not lend any effect to the agreement so far as the interests of the creditors and depositors are concerned."

And the following from *Andrews v. State ex rel. Blair, Superintendent of Banks,* 178 N. E. 581 (Ohio), at page 584:

"It is urged, however, that Andrews is entitled to have his rights measured by rules of equity. It is argued, first, that it having been agreed that the money would be applied upon the double liability, it becomes charged with a trust to be used for creditors exclusively, and, second, that it becomes an equitable set-off against that liability when later asserted. Equity has no such efficacy. Equity is only open to those who have just rights to enforce where the law is inadequate. Equity will not give validity to a transaction which is void at law. Equity will not disregard constitutional or statutory provisions. Applying these principles to the case at bar, equity will not disregard the rights of creditors in order to compel the superintendent of banks to observe an agreement he had no right to make. Those principles are so

well settled as to be axiomatic. Among the numerous cases which might be cited, three leading authorities are Hedges v. Dixon County, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044; Rambo *et al.*, Partners, v. First State Bank of Argentine, 88 Kan. 257, 128 P. 182; Colonial Trust Co. v. Central Trust Co., 243 Pa. 268, 276, 90 A. 189.

"In the instant case, the money paid in by the stockholders on August 5th was not kept separate from other funds of the bank. Its identity was immediately lost by becoming mingled with the general funds of the bank."

Finally, matters have been passed upon by the trial court, sitting without a jury, a jury trial having been formally waived. Under the well known rules of law, the trial court having passed on the weight of the evidence, and its findings supporting the judgment, this appellate court will not, we feel satisfied, disturb the judgment.

Conclusion.

We contend and urge that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST P. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF TO APPELLEE'S FURTHER BRIEF.

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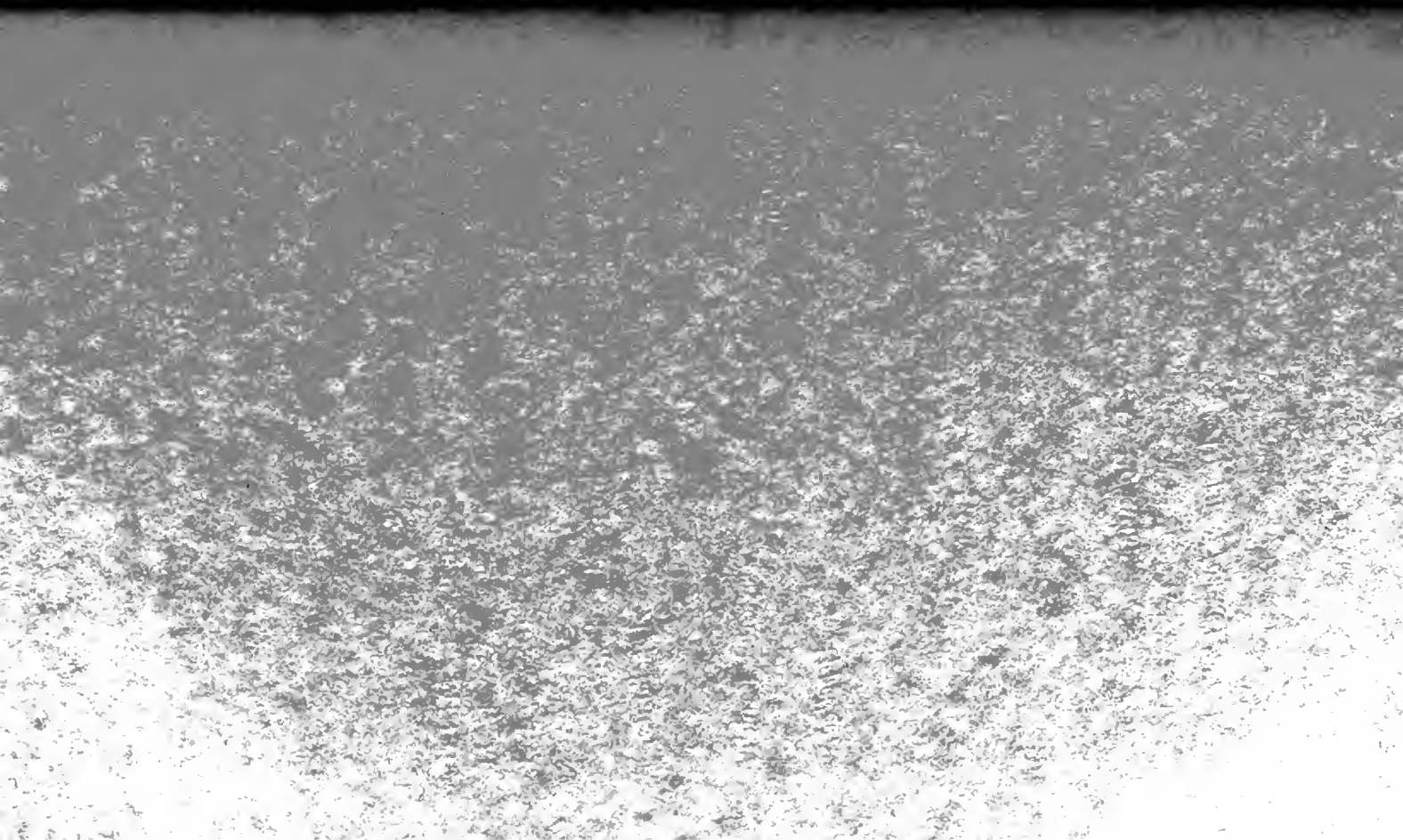

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Appellants,

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Appellee.

APPELLANTS' REPLY BRIEF TO APPELLEE'S FURTHER BRIEF.

The appellee, in its "Introductory," aside from a quite unnecessary allegation as to a purported defective record on the part of the appellants, merely invites the court's attention to the fact that certain portions of appellants' second opening brief are reprints, or substantial restatements, of matters appearing in their original opening

brief. The appellants felt that this Honorable Court was entitled to every consideration, and, therefore, reprinted much of their original opening brief in order to save time and the inconvenience of constant references to the original opening brief.

Reply to Appellee's Contentions Re Appellants' Jurisdictional Statement.

Appellee in its earlier brief, on pages 2 and 3 thereof, alleged that this action would fall on the law side, not in equity, and they repeat this by reference in their further brief. In so doing the appellee obviously failed to take into consideration Rules 1 and 2 of the New Federal Rules of Civil Procedure.

The appellee in its further brief objects to appellants' statement contained on page 6 of appellants' second opening brief, that the new Federal Rules of Civil Procedure are applicable to the above cause. Since this Honorable Court did on the 10th day of May, 1939, decide that the instant case falls under the new Federal Rules of Civil Procedure this objection has been ruled upon, and is now *res adjudicata.*

——— : ———

As in appellants' opening brief, we again object to appellee's statement that "the only time this method of repairing the impaired capital of a national bank had been used was about 1929 and that was in connection with another bank in his territory—the First National Bank of Huntington Beach, which was later merged into a state bank. It was his idea. The office of the Comptroller of the Currency never indicated approval of this as being a

proper method to repair impaired capital nor did it notify disapproval to him. (*Ibid.* pp. 99-100-103.)"

As a matter of truth, R. Foster Lamm testified as to the attitude of the Comptroller's Department on the matter as follows: "Well, I would have to say that they did not disapprove it when it worked." (S. T. 100.) As a matter of fact when counsel for the appellee asked R. Foster Lamm as to whether or not he had ever specifically set forth the plan to the department and asked for their approval or disapproval, he made this answer: "Only as an accepted fact." And when he was asked whether he had ever had an answer from the Comptroller's office as to that being a proper method of repairing impaired capital, he answered: "I never." Pressed by the question: "No answer one way or the other?" he replied: "I do not remember that there was." (S. T. 100.)

The appellee on pages 6, 7, 8 and 9 of its further brief goes into a prior transaction which has no bearing upon the case at bar. The appellants cannot be bound by any correspondence relating to any other transaction than the one involved in this case.

We respectfully urge that the appellee's own conclusion as set forth on page 9 of its further brief in regard to the Deputy Comptroller has no place in a brief.

In regard to appellee's remark on page 10 of its further brief in speaking of Waldron's testimony in that "He does not think they ever kept such a record on the official books of the bank," we submit that Mr. Waldron's exact testimony in this regard appears on page 181 of the supplemental transcript of record and in answer to that very question reads as follows: "I think not on the official books of the bank. Whether they did by memorandum

or not, I am not sure." Further down, on the same page, in answer to the question as to whether or not the directors kept a set of books among the bank books, he made this reply: "I think not. They kept the record." It is also to be noted from Mr. Waldron's testimony, appearing on page 178 of the supplemental transcript of record, that in his report of December, 1930, the program that had already been put into effect at a prior date along exactly the same lines as the one in this case *went through to the Comptroller's office, and nowhere is it shown that the Comptroller's office took occasion to disapprove it.*

As to the plan of buying the depreciation in the bond account being submitted to Bank Examiner Lamm as mentioned on page 16 of appellee's further brief, it is to be noted that on page 97 of the supplemental transcript of record, Mr. Lamm left the district about the middle of 1930 and was replaced by Mr. Waldron as bank examiner, who did remember that the president of the bank took the matter up with him. [S. T. 178-179.]

——— : ———

On pages 17 and 18 of appellee's further brief it is reiterated that the Comptroller insisted, and used the word "must" in his letter of July 2, 1930. We again point out that this letter was in regard to a totally different transaction than the one involved before this Honorable Court, although a similar plan was at that time put into operation, and the Comptroller in that very letter informed them that *they could purchase for cash assets estimated by the Examiner as losses.*

On pages 21 and 22 of appellee's further brief, the question is taken up as to what constitutes cash assets estimated by the examiner as losses. On page 21 appellee defines them as "sour promissory notes" or "*securities of debased value.*" What does depreciation in a bond account make it but a "security of debased value?" (Italics ours.)

The appellee again cites cases already cited in its first reply brief. Again appellants fail to see where those cases are in any way applicable to the facts and circumstances existing in this case, or how they are in point. In the first case cited, *Delano v. Butler, Receiver of Pacific National Bank,* 118 U. S. 634, at page 650 thereof, it was expressly noted by the court that the plaintiff in error in that case *had by his own acts ratified the acts of the bank.*

In the case of *Coast National Bank v. Bloom,* 174 Atl. 576 (N. J.), there is no such agreement between the bank and its directors as that involved in this case, nor was the bank a party to the contract. This case is not in point.

The case of *Wright v. Gurley,* 63 So. 310, is not predicated upon any agreement such as is involved in our case, and cannot be taken as the law in this case.

Likewise, the other cases cited fail to set forth a set of facts and circumstances akin to the case at bar and are, therefore, not in point.

The appellee, in reply to Part V of appellants' argument on page 26, makes the bold statement that the "officers of the bank never even furnished the full text of the agreement to the Comptroller." We fail to find any authority for such a statement nor, indeed, does appellee pretend to offer one.

The appellee's attitude towards the agreement involved in this case is somewhat difficult to uncover. On page 26 of its further brief the statement is made "Formal claims had indeed been presented to and filed with the receiver, but such formal claims could rise no higher than the *legal basis upon which they were founded, and there being no legal basis for them, they were not valid or proper claims.*" Yet on the next page the statement is made: *"The question of unlawfulness arose only incidentally"* and also: "Appellee contended that appellants were not entitled to recover herein on the basis of any agreement of the sort and effect urged by them in their complaint, and that if in fact an attempt had been made to meet the Bank's precarious financial situation by the method provided for in such alleged agreement, *the same would have been unlawful because contrary to public policy and the rules governing the administration of national banks.* * * *" (Italics ours.) Appellants strongly disagree with the contention that the agreement was against public policy. If it was anything but a valid agreement, then it was merely *malum prohibitum.*

On pages 28 and 29 of appellee's further brief, an attempt is made to draw the cases of *Wood v. Imperial Irri. Dist.,* 216 Cal. 748, and *Reed et al v. Mobley, etc.,* 157 S. E. 321 (Ga.), into alignment with appellee's contentions, but this Honorable Court will note from a reading of these cases that they were both tried upon the theory that the money, in the one case deposited in the bank, and in the other case paid as an assessment to repair capital, was impressed with a trust, but the question was not raised as to recovery upon a contract because it was illegal and void. The appellants cited the case of *Wood*

v. Imperial Irri. Dist., 216 Cal. 748, by reason of the court's remark at page 759 which reads:

> "A contract void because it stipulates for doing what the law prohibits is incapable of being ratified."

In the case of *Utley v. Clarke,* 16 Fed. Supp. 435, the plaintiff testified that he had been asked by the president of the bank to loan the bank $25,000 to repair capital. Plaintiff was a director and vice-president. Plaintiff sold to the bank certain bonds in the amount of $25,139.25 and deposited that amount to his own account, then made a check payable, *not to the bank,* but to one Clarke, who was the president of the bank, and accepted the said Clarke's personal promissory note as collateral security therefor. Clarke, without plaintiff's knowledge, deposited plaintiff's check to his own personal account and then issued his (Clarke's) own personal check in the amount of $25,000 to the bank and wrote the Comptroller of the Currency that he had given his own check, and deposited same in surplus and undivided profits account. A record of a directors' meeting held a short time later showed that plaintiff was present and noted that a copy of such letter was read into the minutes of the meeting.

Plaintiff neither claimed a trust upon the part of the bank for his benefit, nor sought a preference over depositors or general creditors of the bank, but sought a judgment to share with them in the assets of the bank. The court found (p. 438), among other things, that:

> "As to defendant receiver's contention that plaintiff as vice-president and director was bound to know all that the books showed as to the transaction, and thus knew that the books showed no obligation of the bank to him, cannot be accepted as there stated.

Plaintiff was bound to know that he had delivered or sold the bonds to the bank and received a credit to his account of $25,139.25 and delivered a check for $25,000 to Clarke (and in this he is assumed to have relied upon Clarke's statement that such was the way the transaction could best be handled and the $25,000 added to the assets of the bank) but he cannot be fairly charged with knowledge of the deposit of the check in Clarke's account nor of the giving by Clarke of his check for the same amount to the credit of the surplus and undivided profits funds of the bank, nor of the letter written by Clarke to the Comptroller nor of what the bank books showed. *Wakeman v. Dalley,* 51 N. Y. 27, 32; 10 *Am. Rep.* 551; *Reno v. Bull,* 226 N. Y. 546, 124 N. E. 144; *Briggs v. Spaulding,* 141 U. S. 132, 147, 11 S. C. 924, 35 L. Ed. 662. Plaintiff could not recover against the bank if Clarke failed to carry out representations made to plaintiff in the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed" (p. 440).

The above clearly shows that the facts and circumstances in that case had nothing to do with such matters as are involved in this case. In that case the agreement was between two individuals, not between the bank and the plaintiff. Hence, this case is entirely out of point so far as appellee's contention is concerned. However, this case does go to show that the appellants are correct

in their contention as stated in Point II of their second opening brief.

In the case of *Fallgatter v. Citizens' National Bank,* 11 Fed. (2d) 383, discussed by the appellee in its further brief at pages 31 and 32, there was no agreement made with the bank as to reimbursement—no purchase of bad assets claimed, and the directors in that case advised the Comptroller of the Currency that they were familiar with its unsatisfactory condition. In the concluding paragraph of a letter to the Comptroller of the Currency they said:

> "In conclusion, we promise to get to work at once to place this bank in the position it should be, and, if necessary, to take out all such paper as might result in a loss in order that the bank may be in such condition as will meet with the approval of this Department."

There was various other correspondence to like effect and a notation made upon the "special assessment account" which read as follows:

> "And that no part hereof can be withdrawn for any other purposes than the payment of an assessment of 100% if and when a similar notice of impairment has been received from the Comptroller of the Currency."

The plaintiff in this case based his claim on the allegation that the money was a special deposit but was unable to prove that it was other than a special account and, as shown above, it was in fact so labeled. Hence it will readily be seen that this case is in no way in point with the present case.

The case of *Page v. Jones,* 7 Fed. (2d) 541, cited on page 33 of appellee's further brief deals with an alleged oral understanding between the plaintiff shareholder and various directors and officers of the bank. No such agreement was actually proven however, but if one did exist then it was purely an agreement between the officers and directors with the shareholders and not between the stockholders and the bank. It has no bearing upon our case whatsoever and is no more in point than are the others above discussed.

The same is true of the case of *Markus v. Austin,* 284 S. W. 326 (Tex.).

None of these cases can be cited as cases dealing with recovery upon illegal contracts.

In connection with recovery upon void and illegal contracts we wish to point out that the several cases heretofore cited by appellants in their second opening brief all hold that when a contract is expressly prohibited by law no court of justice will enforce the same. However, many cases have been decided as to the rights of recovery under such conditions where such contracts are not *malum in se* but are merely *malum prohibitum.* Perhaps, one of the best of these cases is the case of *Schramm v. Bank of California, a national association,* 20 Pac. (2d) 1093, at 1103, which sets forth a learned discussion of void agreements made in contravention of banking laws and as to recovery thereunder. We, therefore, quote:

> "(15, 16) The 1919 agreement does not mention percentages nor any specific pledges of collateral. The two banks could have readily performed their undertakings concerning pledges without violating any part of the 1925 act. We are aware of no reason for declaring that the provisions of that agree-

ment concerning previous conflict with the legislative act before us. The act condemns only excessive pledges. It will be observed from the statement of facts recited in a preceding paragraph that all of the collateral which the defendant possessed on December 3, 1926, had not come into its possession in a single moment. Scarcely a day passed when the Kenton Bank did not bring to the defendants' vaults a quantity of commercial paper, or withdraw some previously deposited. Thus, the amount in defendants' possession constantly fluctuated. When the Kenton Bank suspended business the defendants possessed such a large amount of collateral that its security exceeded the statutory limitation of 125%. The plaintiff demanded the surrender of these pledged assets, and the defendant refused. When the defendant insisted upon retaining all that it possessed, it for the first time announced an attitude in conflict with section 88. In our opinion that section of our law does not demand a holding that the defendant must forfeit all of its security. We believe that the purpose of that enactment will be fully served by requiring it to surrender all of the collateral which it possess in excess of the statutory limitation. * * *

It follows from the preceding that the defendant is entitled to retain a sufficient amount of the collateral in its possession to secure it to the extent of 125%, upon the three items which we have held constituted borrowings by the Kenton Bank (107,589.02). The record indicates the order in which the collateral was pledged with the defendant, and the subsequent disposition of the same. *All collateral accepted by the defendant after it had received the limit permitted by section 88, it must deliver to the plaintiff, or account for the proceeds of it.*" (Italics ours.)

To like effect is the case of *Sherman and Ellis v. Indiana Mut. Casualty Co.,* 41 Fed. 588, cert. denied 51 S. Ct. 107, 282 U. S. 893, 75 L. Ed. 787. We quote:

> "138 (3). Recovery of money paid or property transferred. C. C. A. Ind. 1930. Courts ordinarily permit property parted with, or services rendered on faith of unlawful contracts, to be recovered or compensated for."

The *Town of Meredith v. Fullerton,* 139 Atl. 359, 83 N. H. 124, decided the question as follows:

> "So long as illegal contract remains executory, party may disaffirm it or recover back money or property advanced thereunder."

The case of *Duddy-Robinson Co. v. Taylor,* 242 Pac. 21, 137 Wash. 304, found that:

> "Courts may grant relief on illegal contract, such as recovery of money paid, although parties are in *pari delicto.*"

Another excellent case which deals with illegality of contracts and recovery thereunder is that of *Texas Co. v. Bank of America,* 5 Cal. (2d) 35, wherein, as in this case, there was lacking one of the essential elements of a valid contract, namely, a party capable of contracting. The Supreme Court held the contract to be void and the lessee entitled to recover the money paid to the lessor. The court found that the contract was *ultra vires* and "if the lease was void, respondent was entitled to a return of its payment for the lease. (*Schlicker v. Hemenway,* 110 Cal. 579; *Hellman v. Merz,* 112 Cal. 661)."

Another case on this point is *Green v. Frahm,* 176 Cal. 259, 260.

The same rule is laid down in the following cases:

Smith v. Bach, 183 Cal. 259, 263;

DeLeonis v. Walsh, 140 Cal. 182, 73 Pac. 813;

Wasserman v. Sloss, 117 Cal. 431, 59 Am. St. Rep. 209, 38 L. R. A. 176, 49 Pac. 566;

Johnston v. Russell, 37 Cal. 670.

——— : ———

Not one of the cases cited by the appellee in reply to appellants' Point VIII in their second opening brief is in point, since not one of the cases cited or quoted from was decided as to findings which were in form of negative pregnants.

The case of *Hartford v. Pac. Mut. Tr. Co.,* 16 Cal. App. (2d) 378, goes only into the question as to whether the evidence was sufficient to support certain findings which appellants claimed were conflicting, but there is no claim made, nor mention made of, such findings being negative pregnants.

The case of *Wagner v. El Centro Seed, etc., Co.,* 17 Cal. App. 387, at 389, as is shown by the portion quoted, is again as to apparent inconsistency between different portions of the findings, and does not deal with a negative pregnant.

The same is true as to the case of *Ethel D. Company v. Industrial Acci. Comm.* (1934), 219 Cal. 699, at 708.

The portion quoted from 24 *Cal. Jur.* at 986 is the law applicable to *inconsistent findings* and not as to negative pregnants. The law as to *negative pregnant findings* as

set forth in 24 Cal. Jur. will be found under that heading on page 976, and reads as follows:

> "A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of such allegation."

Hence, it would seem that the appellee has quoted from the wrong section.

The case of *Ford v. Cotton,* 82 Cal. App. 675, gone into at length by the appellee, makes no mention of a negative pregnant, but is purely as to whether or not the court's findings were sufficient to support the judgment.

The case of *Fritz v. Mills,* 170 Cal. 449, also gone into extensively by the appellee, is also as to sufficiency in form of a finding, but not as to whether or not that finding is in form a negative pregnant. The finding complained of in that case was "that all of the denials and allegations contained in the answer of the defendants to said third amended complaint are, and that each and every one of them is, supported by the evidence and true." As stated in the syllabus, this form of finding has always been held sufficient, but neither the finding nor anything contained in the case has any bearing on the question of a negative pregnant.

The appellee, from page 34 to the end of page 40 of its further brief, has cited and quoted from many cases at length. However, since the other cases are no more in point with the question of whether or not the findings involved in this case are in form negative pregnants than are those which have already been discussed by the appellants, we do not see any reason to burden this court further by lengthy discussion of the same. Suffice it to say, that none of them deal with a negative pregnant finding.

Definition Negative Pregnant.

The definition of a negative pregnant finding is well set forth in *Witkin's Summary of California Law*, page 919, section 2 (d) and reads as follows:

> "Denials in these forms are considered evasive, and raise no issue. (1) A negative pregnant is a denial that implies an admission. Usually this is by reason of the fact that the denial is in the exact words of the allegation, and the allegation embraces several matters, so that the defendant denies merely the literal truth, and not the substance of the allegation. Thus, where plaintiff pleads an indebtedness 'in the sum of $1,000,' he admits, in effect, indebtedness in the sum, *e. g.*, of $999. The same is true of damages, value, quantity, etc.; a denial of the precise amount or number alleged is an admission of any lesser amount or number. A denial that plaintiff delivered 'all' of the materials agreed upon is a negative pregnant. (*Jones and Laughlin, etc. Co. v. Doble Co.* (1912), 162 Cal. 497, 123 P. 290.) So is a denial that goods were sold or delivered to defendant 'at plaintiff's mill in New Jersey' (admission that they might have been sold or delivered at another place). (*Janeway & Carpenter v. Long Beach Co.* (1922), 190 Cal. 150, 211 P. 6). (See also *Doll v. Good* (1869), 39 Cal. 287; *Boscus v. Bohlig* (1916), 173 Cal. 687, 162 P. 100; *Leffingwell v. Griffing* (1866), 31 Cal. 231; *Holcomb v. Long Beach Inv. Co.* (1933), 129 Cal. App. 285, 19 P. (2d) 31). (2) A *conjunctive denial* is a negative pregnant, and bad as such, which results where the complaint alleges several matters in the conjunctive, and the answer denies them in the same manner, instead of denying each averment separately. The effect of this evasive

denial is that any averment might be true, even though all together may not be. Thus, 'Deny that said mortgage was, after the execution thereof, *and* on the 7th day of October, 1920, duly recorded,' is a conjunctive denial. (*Motor Inv. Co. v. Breslauer* (1923), 64 Cal. App. 230, 221 P. 700). (See also *Janeway & Carpenter v. Long Beach Co., supra; Woodworth v. Knowlton* (1863), 22 Cal. 164; *Richardson v. Smith* (1866), 29 Cal. 529.)"

A negative pregnant was contained in the findings in the case of *United Air Services, Ltd. v. Sampson,* 96 Cal. App. Dec. 13 (29). The case was reversed.

On page 42 of appellee's further brief, in reply to appellants' Point VIII, the appellee cites and quotes from the case of *Heath et al. v. Turner, et al.,* 77 S. W. (2d) 9, at page 12. While a reading of the quoted portion would seem to support the appellee's position, a reading of the entire case discloses that the facts are so far out of alignment with the instant case as to prevent the same being in point.

The same is true of the case of *Andrews v. State, ex rel. Blair, etc.,* 178 N. E. 581, and the cases therein cited.

——— : ———

Since the appellee has throughout its further brief referred to and reiterated parts of its first brief, appellants are constrained to and must incorporate in this, their reply to appellee's further brief, appellants' original reply brief *in toto.*

Conclusion.

The transcript of record, and the supplemental transcript of record, when thoroughly digested disclose that the appellants are entitled to a reversal of the judgment and decree of the District Court. Both the appellee's first brief and further brief attempt to evade the true issues involved in this case, but, in our opinion, none of the cases cited therein contravert the position of the appellants.

The conclusions recited in our opening brief need no reiteration. Either appellants have a valid contract and are entitled to what they purchased, or they are parties to a contract which is *malum prohibitum,* and are entitled to recover the money they paid thereunder. If any of the findings are in form negative pregnants they cannot support the judgment, and the case should be reversed. Under all these premises the appellants respectfully ask that the decree of the District Court be reversed.

Respectfully submitted,

EDW. C. PURPUS,

Attorney for Appellants.

No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking association and J. V. HOGAN, Receiver, Intervener,

Appellees.

Petition for Rehearing and Application for Stay of Issuance of Mandate If Petition for Rehearing Denied.

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Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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Appellees.

PETITION FOR REHEARING.

To the Honorable Circuit Court of Appeals of the United States in and for the Ninth Circuit:

Your petitioners respectfully petition for a rehearing of their appeal and a reversal of the decree of the District Court in the above entitled matter upon the following grounds:

1. In the opinion of petitioners certain of their authorities have been overlooked.

The cases of *Yazoo State Bank v. Kimbrough,* 127 So. 149, and *In re Hulitt,* 96 Fed. 785, are directly in point. We quote pertinent parts thereof as follows:

Yazoo State Bank v. Kimbrough, supra:

"Cashiers and directors putting up cash in place of notes, examiner rejected, *held entitled to proceeds of notes when collected.*" (Italics ours.)

In re Hulitt, supra:

"Where a number of shareholders of a national bank in good faith paid an assessment made to comply with the requirements of the Comptroller to make good an impairment of the bank's capital, although such an assessment was invalid, because made by the directors instead of by the stockholders, on the insolvency of the bank, and after the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the non-paying shareholders, and repaid the amount so paid, before general distribution of remaining assets among all the shareholders."

2. We find no place in the opinion where this Honorable Court has commented upon, or decided, the following:

"The respective claims of the appellants presented to the receiver were valid and subsisting claims against the bank. The agreement entered into between the bank and the appellants in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed,

three years later. There is no contention but that the respective claims of the appellants herein were duly presented to the receiver in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24]. That there can be such a valid and subsisting claim as the one in this point need scarcely be argued, but we do quote the following case on this point:

Eisele v. First National Bank, 137 Atl. 827, 101 N. J. Equity 61, affirmed (Err. & App., 1928) 142 Atl. 29, 102 N. J. Equity 598."

3. There has been no decision rendered on the point that:

"If the agreement entered into between the appellants and the bank in compliance with the meeting of June 18, 1931, was in fact unlawful, then it was void in its inception and the subscribing stockholders have the right under the law to a refund of the respective amounts, paid by them under that contract."

4. The opinion does not find upon the question:

"Findings of fact which are contradictory and in the nature of negative pregnants in form as to ultimate facts material to the cause of action imply the truth of the allegation, and since one part of the contradictory findings would support the judgment and another part would upset it, then the judgment cannot stand."

And in this connection, we cite the following:

"Findings of fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation."

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at p. 540;

Auerbach v. Healy, 174 Cal. 60, 65, 161 Pac. 1157;

Southern Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

"Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand."

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

5. The Court, in its opinion, states as follows:

"It was not shown that the bonds, as a whole appreciated in value. On the contrary, the bond account appears to have been in a worse condition when the receiver took over, and when he later disposed of the assets, than it had been when the agreement was made. Thus, even if this were an action for an accounting, which it is not, there was no basis in the proof for any recovery."

In this connection, we cite the Supplemental Transcript of the Record, pages 188, 189 and 190 thereof, showing that there was an appreciation, however small, of $655.62, in the appreciation of the bonds of the American Beet Sugar and Associated Tel. and Tel.

We, therefore, request this Court to consider this Petition for Rehearing as a simple plea to repair an irreparable loss which will actually occur if the case is not reversed.

Respectfully submitted,

EDW. C. PURPUS,
Attorney for Petitioners.

Certificate of Counsel.

Edward C. Purpus, attorney above, filing this petition, hereby certifies that in his judgment the Petition for Rehearing is in all respects well founded, and that it is not interposed for delay.

EDW. C. PURPUS,

No. 9020

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER and M. E. DAY,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking association and J. V. HOGAN, Receiver, Intervener,

Appellees.

Application for Stay of Issuance of Mandate If Petition for Rehearing Denied.

May It Please Your Honors:

In the event of denial of the petition for rehearing, petitioners desire to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari, and therefore pray for a stay of the issuance of the Mandate herein for such purpose.

EDW. C. PURPUS,

Attorney for Petitioners.